TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 515.

THE CITY OF LOUISIANA, PLAINTIFF IN ERROR,

vs.

THOMAS J. WOOD.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED SEPTEMBER 23, 1879.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the eastern district of Missouri, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, at the September term, 1878, thereof, between Thomas J. Wood, plaintiff, and against the City of Louisiana, defendant, a manifest error hath happened, to the great damage of the said defendant, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this third day of February, in the year of our Lord one thousand eight hundred and seventy-nine.

Issued at office in the city of St. Louis, with the seal of the circuit court of the United States for the eastern district of Missouri, dated as aforesaid.

[SEAL.] M. M. PRICE,
Clerk Circuit Court United States, Eastern District of Missouri,
By A. P. SELBY, *Deputy.*

Allowed by—

SAMUEL TREAT, *Judge.*

2 *Return to writ.*

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the *the* record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereto subscribe my name, and affix the seal of said circuit court, at office in the city of St. Louis, this 19th day of May, A. D. 1879.

[SEAL.] M. M. PRICE
Clerk of said Court,
By A. P. SELBY, *Deputy.*

(Indorsed:) No. . United States circuit court, eastern district of Missouri. Thomas J. Wood vs. City of Louisiana. Writ of error to the circuit court of the United States, eastern district of Missouri. Returned and filed day of , 187 . , clerk.

3 The United States of America to Thomas J. Wood, greeting:

You are hereby cited and admonished to be and appear at a Supreme

Court of the United States to be holden at Washington, D. C., on the second Monday of October next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the eastern district of Missouri, wherein the City of Louisiana is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Samuel Treat, judge of the circuit court of the United States for the eastern district of Missouri, this third day of February, in the year of our Lord one thousand eight hundred and seventy-nine.

SAMUEL TREAT,
Judge United States Circuit Court, Eastern District of Missouri.

Due service of above citation upon Pl'ff Wood is hereby acknowledged at St. Louis this 3rd day of February, 1879.

DRYDEN & DRYDEN,
Att'ys for said Wood.

(Indorsed:) United States circuit court, eastern district of Missouri. Thomas J. Wood vs. City of Louisiana. Citation. Filed , 187 . , clerk.

4 THE UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

In the circuit court of the United States for the eastern district of Missouri.

THOMAS J. WOOD, PLAINTIFF,
vs.
CITY OF LOUISIANA, DEFENDANT.

Be it remembered that at the September term, 1878, of said court, the plaintiff, on the 29th day of October, 1878, filed an amended petition, which is in words and figures as follows:

Amended petition.

In the circuit court of the United States in and for the eastern district of Missouri.

THOMAS J. WOOD, PLAINTIFF,
vs.
CITY OF LOUISIANA, DEFENDANT.

EASTERN DISTRICT OF MISSOURI, *ss:*

The plaintiff, Thomas J. Wood, who is a citizen of the State of Ohio, complains of the defendant, the City of Louisiana, which is a municipal corporation, incorporated and organized under the laws of the State of Missouri, and a citizen of said State of Missouri, and resident within said eastern district, and for amended petition, leave of court to file same being first had, and for the statement of a first cause of action, says that heretofore, and after the 30th day of March, 1872, to wit, on the 16th day of July, 1872, said defendant, for the purpose of borrowing

money for its use and for no other purpose, caused to be printed and written, and to be signed by William Parker, then its mayor, and to be countersigned by N. H. Griffith, then the clerk of its city council, and to be sealed with its corporate seal, ten certain written and printed papers in the similitude of genuine negotiable coupon bonds, numbered respectively Nos. 101, 102, 103, 104, 105, 106, 107, 108, 109, and 110, and, each
5 in form containing the promise of defendant to pay to the bearer thereof the sum of one thousand dollars at the Ninth National Bank in the city of New York, on the first day of January, A. D. 1887, with interest at the rate of ten per centum per annum, payable semi-annually on the first days of July and January in each year, according to the interest coupons attached to said bonds, and for the purpose aforesaid and no other, with the view of selling said bonds to any person or persons who might have money to lend to it and be willing to that end to buy them of it; it also without having them presented to the auditor of said State of Missouri for registration and indorsement in manner as required by the 4th section of the act of the general assembly of said State, approved March 30th, 1872, entitled "An act to provide for the registration of bonds issued by counties, cities, and incorporated towns, and to limit the issue thereof," and with a view to avoid the requirements of said act in the issue thereof, caused it to be stated in all of said papers that they had been so signed, countersigned, and sealed on the 1st day of January, 1872, and thereby to appear that they had been issued by it prior to the said 30th day of March, 1872, and not to have been subject to the requirements of the said act, and that they were its valid and bona fide bonds without such registration or indorsement, whereas, in truth and in fact, they had not been so issued before said day, and were subject to said requirements of said act, and without such registration and indorsement were void and of no force or effect as obligations of said city for any purpose whatever.

That also, afterwards, to wit, on the 25th day of August, A. D. 1873, for the purpose aforesaid and no other, and in pursuance of its said design to evade the said act, and without said bonds having been presented to said auditor for registration or indorsement as aforesaid, it
6 caused the same to be presented to plaintiff and requested him to purchase them as its valid bonds issued at the time of the date thereof, to wit, the said first day of January, 1872, and upon the faith of their being such valid bonds of said city to advance and lend to it his money by the purchase thereof.

That the plaintiff then and there being ignorant of the fact that said bonds had been issued after said 30th day of March, 1872, and that the statements made in said bonds as to the time of the signing, countersigning and sealing thereof were false, and believing such statements to be true and to truly represent the time of the issuing thereof, and that the said bonds were what they purported to be, and were good and valid obligations of said defendant, consented to accept and buy of defendant its said ten bonds at the price and sum of nine thousand one hundred and twenty-seven dollars and seventy-seven cents, and then and there, in consideration of the handing over and delivery to him of said bonds, paid over to defendant the said sum of nine thousand one hundred and twenty-seven & $\frac{77}{100}$ dollars.

And the plaintiff says that thereafter the defendant paid the plaintiff in full four semi-annual instalments of interest when the same became due on said several bonds; that is to say, the several instalments falling due on the first days of January and July of the years 1874 and 1875, and also paid forty per centum of the half yearly instalment of interest

which fell due on the 1st day of January, 1876, when the same became due; that on the 1st day of July, 1876, when the interest on said bonds for the half year ending that day became due and payable according to the tenor and effect of said ten bonds, and the coupons thereto attached, the plaintiff demanded of the defendant payment as well of the said last named half year's interest as of the remaining sixty per centum of the previous January instalment, but the defendant then and there failed, neglected and refused to pay the same, and the defendant, because
7 said bonds had not been registered as required by said act of assembly, then and there wholly repudiated said bonds and denied their obligation and binding force upon the defendant, and declared it to be its purpose for the cause aforesaid to make no other or further payment of interest or principal on said bonds, and the defendant from thence hitherto, hath, and still doth wholly refuse to pay the interest on said bonds and to make any provision whatever for the payment of the same, and persists in the avowal of its said purpose never to make any other or further payment on said bonds, and its denial for the cause aforesaid of the obligation and binding force of said bonds upon it.

And the defendant having so repudiated the said bonds and the contracts evidenced thereby, the plaintiff afterwards, on the 22d day of February, 1878, before the institution of this suit, having learned the fact to be that said bonds had been so made and issued after said 30th day of March, 1872, and that the statements contained herein as aforesaid were utterly false, and that they had not at any time been presented to said auditor for registration or indorsement, and were void and of no value; he tendered back to defendant all of its said worthless false and invalid papers called bonds, and demanded of it to return to him the said sum of nine thousand one hundred and twenty-seven and $\frac{77}{100}$ dollars so paid by him to it therefor as aforesaid, but that defendant then and there refused to receive of him the said papers or to repay to him the said sum or any part thereof, and still fails and refuses so to do.

And this plaintiff now still offers to return to defendant the said papers called bonds, and brings the same here into court to be cancelled, and prays for judgment against defendant for the said 9,127 $\frac{77}{100}$ dollars with interest thereon from the said first day of July, 1874, at the rate of six per centum per annum.

8 And the plaintiff, for a second cause of action, says, that heretofore, and after the 30th day of March, 1872, to wit, on the 16th day of July, 1872, said defendant, for the purpose of borrowing money for its use and no other purpose, caused to be printed and written, and to be signed by William Parker, then its mayor, and to be countersigned by N. H. Griffith, then the clerk of its city council, and to be sealed with its corporate seal, nine other certain printed and written papers in the similitude of genuine negotiable coupon bonds, numbered respectively Nos. 83, 84, 85, 86, 87, 88, 89, 90, and 91, and each in form containing the promise of defendant to pay to the bearer thereof the sum of one thousand dollars at the Ninth National Bank in the city of New York, on the first day of January, A. D. 1887, with interest from date at the rate of ten per centum, payable semi-annually on the first days of July and January in each year, according to interest coupons thereto attached, and for the purpose aforesaid and no other, with the view of selling said bonds to any person or persons who might have money to lend to it, and be willing to that end to buy them of it, it also, without having them presented to the auditor of said State of Missouri for registration and indorsement, in manner as required by the 4th section of the act of the general assembly of said State, approved March 30th,

1872, entitled "An act to provide for the registration of bonds issued by counties, cities, and incorporated towns, and to limit the issue thereof", and, with the view of avoiding the requirements of said act in the issue thereof, caused it to be stated in all of said last-named papers that they had been so signed, countersigned, and sealed on the 1st day of January, 1872, and thereby to appear that they had been issued by it prior to said 30th day of March and not to have been subject to the requirements of the said act, and that they were its
9 valid and bona fide bonds without such registration or indorsement, whereas in truth and in fact they had not been so issued before said day and were subject to said requirements of said act, and without such registration & indorsement were void and of no force or effect as obligations of said city for any purpose whatever.

That afterwards, to wit, on the first day of September, A. D. 1873, for the purpose aforesa'd and no other, and in pursuance of its said design to evade the said act, and without said last-mentioned bonds having been presented to said auditor for registration or indorsement as aforesaid, it caused the same to be presented to plaintiff and requested him to purchase them as its valid bonds issued at the time of the date thereof, to wit, the said first day of January, 1872, and upon the faith of their being such valid bonds of said city to advance and lend to it his money by the purchase thereof.

That the plaintiff then and there, being ignorant of the fact that said last-mentioned bonds had been issued after said 30th day of March, 1872, and that the statements made in said bonds as to the time of signing, countersigning, and sealing thereof were false, and believing such statements to be true and to truly represent the time of the issuing thereof, and that the said last-mentioned bonds were what they purported to be, and were good and valid obligations of said defendant, consented to accept and buy of defendant its said nine bonds at the price and sum of eight thousand two hundred and fifteen dollars, and then and there, in consideration of the handing over and delivery to him of said bonds, paid over to defendant the said sum of eight thousand two hundred and fifteen dollars.

And the said plaintiff says, that thereafter the defendant paid to the plaintiff in full four semi-annual instalments of the interest when the same became due on said nine several bonds; that is to say, the several instalments falling due on the first days of January and July of the year 1874 and 1875; and also paid forty per centum of the half-
10 yearly instalment of interest which fell due on the first day of January, 1876, when the same became due; that on the first day of July, 1876, when the interest on said bonds for the half-year ending that day became due and payable, according to the tenor and effect of said nine bonds and the coupons thereto attached, the plaintiff demanded of the defendant payment as well of the said last-named half-year's interest as of the remaining sixty per centum of the previous January instalment, but the defendant then and there failed, neglected, and refused to pay the same, and the defendant, because said bonds had not been registered as required by said act of assembly, then and there wholly repudiated said bonds and denied their obligation and binding force upon the defendant, and declared it to be its purpose for the cause aforesaid to make no other or further payment of interest or principal on said bonds; and the defendant, from thence hitherto, hath and still doth wholly refuse to pay the interest on said bonds, and to make any provision whatever for the payment of the same, and persists in the avowal of its said purpose never to make any other or further payment

on said bonds, and in its denial for the cause aforesaid of the obligation and binding force of said bonds upon it.

And the defendant, having so repudiated the said bonds and the contracts evidenced thereby, the plaintiff afterwards, on the 22d day of February, 1878, before the institution of this suit, having learned the fact to be that said bonds had been so made and issued after said 30th day of March, 1872, and that the statements contained therein as aforesaid were utterly false, and that they had not at any time been presented to said auditor for registration or indorsement, and were void and of no value, he tendered back to defendant all of its said worthless, false, and invalid papers called bonds, and demanded of it to return to him the said sum of 8,215 dollars so paid by him to it therefor as
11 aforesaid, but that defendant then and there refused to receive the said papers or to repay to him the said sum or any part thereof, and still fails and refuses so to do. And this plaintiff now still offers to return to defendant the said papers called bonds, and brings the same here into court to be cancelled, and prays for judgment against defendant for the said sum of eight thousand two hundred and fifteen dollars, with interest thereon from the said first day of July, 1874, at the rate of six per centum per annum.

3RD COUNT. And the plaintiff for a statement of a third cause of action says that heretofore and after the 30th day of March, 1872, to wit, on the 16th day of July, 1872, said defendant for the purpose of borrowing money for its use and for no other purpose caused to be printed and written, and to be signed by William Parker, then its mayor, and to be countersigned by N. H. Griffith, then the clerk of its city council, and to be sealed with its corporate seal, a certain written and printed paper in the similitude of a genuine negotiable coupon bond numbered 77, and in form containing the promise of the defendant to pay to the bearer thereof the sum of 1,000 dollars at the Ninth National Bank in the city of New York, on the first day of January, 1887, with interest at the rate of ten per cent. per annum, payable semi-annually on the 1st days of July and January in each year, according to the interest coupons attached to said bond No. 77, and for the purpose aforesaid and no other, with the view of selling said last named bond to any one who might have money to lend to it, and be willing to that end to buy said bond of defendant, it also without having said bond presented to the auditor of the said State of Missouri for registration and indorsement in manner as required by the 4th section of the act of the general assembly of said State, approved March 30th, 1872, entitled "An act to provide for the registration of bonds issued by counties, cities, and incor-
12 porated towns, and to limit the issue thereof," and with a view of evading the requirements of said act in the issue thereof, caused it to be stated in said bond that it, said bond, had been so signed, countersigned, and sealed on the 1st day of January, 1872, and thereby to appear that it had been issued by the defendant prior to said 30th day of March, 1872, and not to have been subject to the requirements of said act of assembly, and that it was defendant's valid and bona fide bond without such registration or indorsement, whereas in truth and in fact it had not been so issued before said 30th day of March, 1872, and was subject to the said requirements of said act of assembly and without such registration and indorsement was void and of no force or effect as an obligation of said city for any purpose whatever.

That also, afterwards, to wit, on the 24th day of June, 1873, for the purpose aforesaid and no other, and in pursuance of its said design to evade the said act of assembly, and without said bonds having been

presented to said auditor for registration and endorsement, as aforesaid, the defendant caused the said bond No. 77 to be presented to one Lewis Dorsheimer and requested him to purchase the same as its valid bond issued at the time of the date thereof, to wit, the 1st day of January, 1872, and upon the faith of its being the valid bond of said city to advance and lend his money to defendant by the purchase of said bond.

That said Lewis Dorsheimer being then and there ignorant of the fact that said bond had been issued after said 30th day of March, 1872, and that the statements made in said bond as to the time of the signing, countersigning, and sealing thereof were false, and believing such statements to be true, and truly to represent the time of the issuing thereof, and that the said bond was what it purported to be, and was the good and valid obligation of the defendant, consented to accept
13 and buy the said bond of the defendant at the price and sum of 950 dollars, and the defendant then and there handed over and delivered to the said Dorsheimer the said bond No. 77, and in consideration thereof and therefore the said Dorsheimer then and there advanced and paid to the defendant the said sum of 950 dollars.

And afterwards, on or about the 5th day of April, 1875, the said Louis Dorsheimer for value, sold, transferred, and delivered said bond No. 77 to certain copartnership of persons doing business in the name of P. F. Keleher & Co., who afterwards, on the day and year last aforesaid for value, sold, transferred, and delivered the said bond No. 77 to the plaintiff, and the plaintiff says that at the time he so acquired and paid for said bond, he had not any knowledge or notice of the falsity of the said recitals in said bond, or of the fact that said bond had been issued after the said 30th day of March, 1872, but he says that he so purchased and paid for same in good faith believing that the said recitals were true, and that said bond had been issued prior to said 30th day of March, 1872, and that it was the valid bond and obligation of the defendant.

And the plaintiff says that during the time the said Dorsheimer held and owned the said bond the defendant paid to him four semi-annual instalments of interest when the same became due on said bond No. 77; that is to say, the several instalments of interest thereon falling due on the 1st day of July, 1873, and the first days of January and July, 1874, and the first day of January, 1875; and the defendant paid to the plaintiff the instalment of interest on said bond falling due the 1st day of July, 1875, when due, and 40 per centum when due of the instalment falling due the 1st day of January, 1876; that on the 1st day of July, 1876, when the interest on said bond 77 for the half year ending that day, became due and payable according to the tenor and effect of said bond and the coupons thereto attached, the plaintiff demanded
14 of the defendant payment as well of the said last half years' interest, as the remaining sixty per centum of the previous January instalment, but the defendant then and there failed, neglected, and refused to pay the same, and the defendant because said bond had not been registered as required by said act of assembly, then and there wholly repudiated said bond and denied its obligation and binding force upon the defendant, and declared it to be its purpose for the cause aforesaid to make no other or further payment of interest or principal on said bond, and the defendant from thence hitherto hath refused and still doth wholly refuse to pay the interest on said bond and to make any provision whatever for the payment of the same, and persists in the avowal of its said purpose never to make any other or further payments on said bond, and its denial for the cause aforesaid of the obligation and binding force of said bond upon it.

And the defendant having so repudiated said bond, and the contract evidenced thereby, the plaintiff afterwards on the 22d day of February, 1878, before the institution of this suit, having learned the fact to be that said bond had been so made and issued after said 30th day of March, 1872, and that the statements contained therein as aforesaid, were utterly false, and that the said bond had not at any time been presented to said auditor for registration or indorsement and *were* void and of no value, he tendered back to the defendant the said bond and demanded of the defendant the return and repayment to plaintiff of the said sum of 950 dollars so paid to the defendant for said bond 77, but that the defendant refused to receive said bond or to repay the said 950 dollars, or any part thereof, and still fails and refuses so to do. And the plaintiff brings the said bond into court and now here offers to surrender the same up to the defendant to be cancelled, and he prays for judgment for said sum of 950 dollars and interest thereon from
15 the 1st day of January, 1876, at the rate of six per cent. per annum.

4TH COUNT. And the plaintiff for the statement of a fourth cause of action says, that heretofore and after the 30th day of March, 1872, to wit, on the 16th day of July, 1872, said defendant for the purpose of borrowing money for its use, and for no other purpose, caused to be printed and written, and to be signed by William Parker, then its mayor, and to be countersigned by N. H. Griffith, then the clerk of its city council, and to be sealed with its corporate seal, a certain printed paper in the similitude of a genuine negotiable coupon bond, numbered 121, and in form containing the promise of the defendant to pay to the bearer thereof the sum of 1,000 dollars, at the Ninth National Bank in the city of New York, on the first day of January, 1887, with interest at the rate of ten per centum per annum, payable semi-annually on the first days of July and January in each year, according to the interest coupons attached to said bond No. 121; and for the purpose aforesaid, and no other, with the view of selling said last-named bond to any one who might have money to lend to it, and be willing to that end to buy said bond of defendant, it also without having said bond presented to the auditor of the said State of Missouri for registration and indorsement in manner as required by the 4th section of the act of the general assembly of said State, approved March 30th, 1872, entitled "An act to provide for the registration of bonds issued by counties, cities, and incorporated towns, and to limit the issue thereof," and with a view of evading the requirements of said act in the issue thereof, caused it to be stated in said bond that it, said bond, had been so signed, countersigned, and sealed on the 1st day of January, 1872, and thereby to appear that it had been issued by the defendant prior to said 30th day of March, 1872, and not to have been subject to the requirements of said act of assembly, and that it was defendant's valid and bona fide bond without
16 such registration or indorsement, whereas in truth and in fact, it had not been so issued before said 30th day of March, 1872, and was subject to the said requirements of said act of assembly, and without such registration and indorsement was void and of no force or effect as an obligation of said city for any purpose whatever; that also, afterwards, to wit, on the 24th day of February, 1874, for the purpose aforesaid and no other, and in pursuance of its said design to evade the said act of assembly, and without said bond having been presented to said auditor for registration and indorsement as aforesaid, the defendant caused the said bond, No. 121, to be presented to one John F. Gibbons, and requested him to purchase the same as its valid bond issued at the

time of the date thereof, to wit, the 1st day of January, 1872, and upon the faith of its being the valid bond of said city to advance and lend his money to defendant by the purchase of said bond.

That the said John F. Gibbons, being then and there ignorant of the fact that said bond had been issued after said 30th day of March, 1872, and that the statements made in said bond as to the time of the signing, countersigning, and sealing thereof were false, and believing such statements to be true and truly to represent the time of the issuing thereof, and that the said bond was what it purported to be, and was the good and valid obligation of the defendant, consented to accept and buy the said bond of the defendant at the price and sum of $916\frac{66}{100}$ dollars, and the defendant then and there handed over and delivered to the said Gibbons the said bond No. 121, & in consideration thereof and therefor the said Gibbons then and there advanced and paid to the defendant the said sum of $916\frac{66}{100}$ dollars.

And afterwards, on or about the 5th day of April, 1875, the said John F. Gibbons, for value, sold, transferred, and delivered said bond No. 121 to a certain copartnership of persons doing business in the name
17 of P. F. Keleher & Co., who afterwards, on the same day and year last aforesaid, for value, sold, transferred, and delivered the said bond No. 121 to the plaintiff. And the plaintiff says that at the time he so acquired and paid for said bond he had not any knowledge or notice of the falsity of the said recitals in said bond, or of the fact that said bond had been issued after the said 30th day of March, 1872, but he says that he so purchased and paid for the same in good faith, believing that the said recitals were true, and that said bond had been issued prior to said 30th day of March, 1872, and that it was the valid bond and obligation of the defendant.

And the plaintiff says that during the time the said Gibbons held and owned said bond the defendant paid to him two semi-annual instalments of interest when the same became due on said bond No. 121, that is to say, the several instalments of interest thereon falling due on the first day of July, 1874, and the 1st day January, 1875; and the defendant paid to the plaintiff the instalment of interest on said bond falling due the first day of July, 1875, when due, and 40 per centum when due of the instalment falling due on the 1st day of January, 1876; that on the 1st day of July, 1876, when the interest on said bond No. 121 for the half year ending that day became due and payable according to the tenor and effect of said bond and the coupons thereto attached, the plaintiff demanded of the defendant payment as well of the said last half year's interest as of the remaining sixty per centum of the previous January instalment, but the defendant then and there failed, neglected, and refused to pay the same; and the defendant, because said bond had not been registered as required by said act of assembly, then and there wholly repudiated said bond and denied its obligation and binding force upon the defendant, and declared it to be its purpose, for the cause
18 aforesaid, to make no other or further payment of interest or principal on said bond; and the defendant from thence hitherto hath refused, and still doth wholly refuse to pay the interest on said bond, and to make any provision whatever for the payment of the same, and persists in the avowal of its said purpose never to make any other or further payment on said bond, and its denial, for the cause aforesaid, of the obligation and binding force of said bond upon it. And the defendant having so repudiated said bond and the contract evidenced thereby, the plaintiff afterwards, on the 22d day of February, 1878, before the institution of this suit, having learned the fact to be that said bond

had been so made and issued after said 30th day of March, 1872, and that the statements contained therein as aforesaid were utterly false, and that the said bond had not at any time been presented to said auditor for registration or indorsement, and were void and of no value, he tendered back to the defendant the said bond, and demanded of the defendant the return and repay*payment* to plaintiff of the said sum of 916.66 dollars so paid to the defendant for said bond No. 121, but that the defendant refused to receive said bond or to repay the said 916.66 dollars, or any part thereof, and still fails and refuses so to do. And the plaintiff brings the said bond into court and now here offers to surrender the same up to the defendant to be cancelled, and he prays for judgment for said sum of 916.66 dollars and interest thereon from the first day of January, 1876, at the rate of six per cent. per annum.

5TH COUNT. And whereas also the defendant afterwards, to wit, on the day and year and at the district aforesaid, was indebted to the plaintiff in the sum of 21,000 dollars, for money by the plaintiff before that time lent and advanced to, and paid, and laid out and expended for the defendant, and at the defendant's special instance and re-
19 quest; and also in the further sum of 21,000 dollars for other money by the said defendant before that time had and received to and for the use of the plaintiff, and being so indebted, the defendant, in consideration thereof, afterwards, to wit, on the day and year and at the district aforesaid, promised the plaintiff to pay him the said several sums of money in this count mentioned when it, the defendant, should be thereunto afterwards requested.

6TH COUNT.—And whereas also the defendant afterwards, to wit, on the day and year last aforesaid, and at the district aforesaid, accounted with the plaintiff of and concerning divers other sums of money from the said defendant to the plaintiff before that time due and owing and then in arrear and unpaid, and upon such accounting the said defendant was then and there found to be in arrears and indebted to the plaintiff in the further sum of 21,000 dollars, and being so found in arrear and indebted, it, said defendant, undertook and promised the plaintiff to pay him the said last mentioned sum of money when the defendant should be thereunto afterwards requested. Nevertheless, the defendant has not as yet paid the said several sums of money or any of them, or any part thereof, to the plaintiff, although often requested so to do, but the defendant to pay the same hath hitherto wholly neglected and refused, and still doth neglect and refuse, to the damage of the plaintiff 40,000 dollars, for which he sues and prays judgment.

DRYDEN & DRYDEN,
Att'ys for Pl'ff.

And afterwards, at said September term, 1878, of said court, and on the 29th day of October, 1878, the defendant filed its answer to part of said amended petition, which is as follows:

20 *Answer to part of petition.*

In the circuit court of the United States in and for the eastern district of Missouri.

THOMAS J. WOOD, PL'FF,
vs.
THE CITY OF LOUISIANA, DEF'T.

Now comes the defendant, by its attorney, and for answer to the first,

second, fifth, and sixth counts of plaintiff's amended petition denies each and every allegation contained in said counts of said amended petition, and denies that it is indebted to said plaintiff in any sum or amount whatever.

And defendant further says that no authority existed for issuing or selling any bonds at the time plaintiff alleges he bought the said bonds or at the time the said bonds purported to bear date; that the ordinance or authority under which the alleged sale was made authorized the fund commissioner to sell bonds to the amount of seventy-five thousand dollars and no more, and that previous to the alleged sale of the bonds sued on, and previous to the date they purported to bear, the said fund commissioner had already issued and disposed of bonds amounting to seventy-five thousand dollars, and that then his agency terminated, and that plaintiff therefore purchased the bonds and laid out and expended his money at his peril, no authority existing on the part of the fund commissioner to act as agent for or bind the defendant in any manner; and now, having fully answered, defendant asks to be discharged, with its costs.

WAGNER, DYER & EMMONS,
Att'ys for Def't.

And on said 29th day of October, 1878, at said term of court, the defendant filed its demurrer to part of said amended petition,
21 which said demurrer is in words and figures following, to wit:

Demurrer to part of petition.

In the circuit court of the United States in and for the eastern district of Missouri.

THOMAS J. WOOD, PL'FF,
vs.
THE CITY OF LOUISIANA, DEF'T.

The defendant appears, by its attorneys, and demurs to the second and third counts in plaintiff's amended petition, and for grounds of objection states:

1st. That said counts do not show any cause of action against this defendant.

2nd. That said counts do not show any relation or privity of contract between plaintiff and defendant by which defendant is answerable to plaintiff.

WAGNER, DYER & EMMONS,
Att'ys for Def't.

And afterwards, at said September term, 1878, and on said 29th day of October, the plaintiff filed his replication to defendant's answer, which is in words and figures following, to wit:

Reply.

In the U. S. circuit court for the E. dist. of Missouri. September term, 1878.

THOMAS J. WOOD, PLAINTIFF,
vs.
CITY OF LOUISIANA, DEFENDANT.

The pl'ff, for replication to the special plea of the defendant in its

answer to the amended petition pleaded, denies each and every of the allegations in said special plea contained.

And the plaintiff, for another and further replication to said special plea, leave of the court to file the same being first had and obtained, says that after the sale by the defendant, through and by its said fund commissioner, of the several bonds in the petition mentioned, the
22 defendant, well knowing that said bonds had been so sold and that said fund commissioner had received the several sums of money for which the same had been so sold, accepted the said moneys, and appropriated and applied the same to its own uses and purposes; and the said defendant with such knowledge did from year to year, for several years next before its repudiation of said bonds because not registered, pay to the plaintiff the semi-annual interest limited and secured by said bonds, and so the plaintiff says that the defendant thereby waived the supposed excessive action of said fund commissioner, and ratified, confirmed, and validated the act of said fund commissioner in selling said bonds.

And the said pl'ff, for another and further replication to the said special plea, leave of the court to file the same being first had and obtained, says that, by virtue of ordinance numbered 612 duly passed by the city council of the defendant and approved by the mayor of the def't March 18th, 1871, authority was given by the defendant to its said fund commissioner to negotiate the bonds of the defendant for the purpose of raising money to pay and liquidate the debts of the defendant, which said ordinance was in full force and effect at the time of the sales of the bonds in the petition mentioned by said commissioner, and the plaintiff says that at the time of the passage of said ordinance, and that at the time of the said sales by said fund commissioner, the debts of the defendant alluded to and provided for in said ordinance 612 amounted in the aggregate to one hundred and fifty thousand dollars and more. Wherefore pl'ff prays judgment as in his amended petition he has prayed.

DRYDEN & DRYDEN,
Att'ys for Pl'ff.

23 And afterwards, to wit, at the said September term, 1878, of said court, and on the 13th day of November, the following proceedings were had in said case, to wit:

Submission.

THOMAS J. WOOD, PLAINTIFF,
vs.
CITY OF LOUISIANA, DEFENDANT.

Now come the parties by their attorneys, and this case being regularly called for trial, and both parties being ready, the same is submitted to the court, without the intervention of a jury, upon the pleadings, proofs, and arguments of counsel, but the court not being fully advised as to what judgment to render in the premises takes further time to consider thereof.

And afterwards at an adjourned day of said September term, 1878, of said court, held on the 7th day of December, 1878, the following further proceedings were had in said case, to wit:

Demurrer sust'd.

THOMAS J. WOOD, PLAINTIFF,
vs.
CITY OF LOUISIANA, DEFENDANT.

Now again come the said parties by their attorneys, the plaintiff by Messrs. Dryden and Dryden, and the defendant by Messrs. Wagner, Dyer and Emmons, and the court having considered the demurrer of the defendant heretofore filed to the second and third counts of the amended petition, and being fully advised thereof, finds the law thereon for the plaintiff and orders that said demurrer to said counts be, and the same is hereby, overruled; and the said parties, by their attorneys, now here consenting that the answer heretofore filed by the defendants as to the other counts thereof may be taken as answer to the whole of said amended petition, this cause is now submitted again to the court, without the intervention of a jury, upon the pleadings, proofs, and arguments of counsel, and thereupon, upon consideration thereof and
24 being fully advised in the premises, the court finds as follows, to wit:

Finding.

That the plaintiff is a citizen of the State of Ohio, and the defendant is a municipal corporation, incorporated and existing under the laws of the State of Missouri, and a citizen of this State; the city council of defendant corporation duly passed an ordinance numbered 525, which was duly approved by the defendant's mayor on the 8th day of January, 1867; which ordinance is as follows, viz:

No. 525. CITY DEBT.

AN ORDINANCE in relation to the public debt of the city, the issuing of bonds, and to provide for the funding, consolidation, and settlement of all outstanding debts of the city of Louisiana, due and to become due.

Be it ordained by the city council of the city of Louisiana, as follows:

SEC. 1. For the purpose of carrying out the objects of this ordinance, the mayor and treasurer of the city are hereby authorized and empowered to issue bonds of the city to an amount not exceeding seventy-five thousand dollars.

SEC. 2. Said bonds shall be printed in blank, with interest coupons attached, payable at any time not less than one nor more than twenty years, bearing interest at ten per cent. per annum, payable semi-annually, and shall be signed by the mayor, attested by the clerk of the city council, and countersigned by the treasurer, and shall be issued under the seal of the city; provided, however, that no bonds of five hundred dollars and upwards shall be issued and made payable at any time less than five years.

SEC. 3. The coupons attached to said bonds shall be signed by the mayor and attested by the clerk of the city council, and shall be payable at the city treasury on the first day of January and the first day of July of each year during which said bonds may run.

SEC. 4. Said bonds shall be prepared in such sums and for such time within the periods above named as may be deemed proper by the mayor and treasurer.

SEC. 5. There is hereby created in the city the office of "city

25 fund commissioner," who shall be appointed by the mayor with the concurrence of a majority of the city council, and he shall hold his office for a period of two years and until his successor shall be duly appointed and qualified.

SEC. 6. The city fund commissioner shall execute a bond with security to the city in the sum of twenty-five thousand dollars, to be approved by the city council, before entering upon the discharge of his duties; the condition of said bond being that he will faithfully account to the city for all bonds, papers, and money coming into his hands and belonging to the city, and that he will strictly comply with the ordinances or other requirements of the city in the discharge of his duties.

SEC. 7. It shall be the duty of said commissioner to report his proceedings to the city council on the first days of January, April, July, and November of each year.

SEC. 8. On demand of said commissioner the mayor and treasurer shall deliver to him the bonds of the city payable in such amounts and in such time as he may require; provided, that not exceeding twenty-five thousand dollars of said bonds shall be in his hands at any one time, and upon the delivery thereof they shall take his receipt, specifying particularly the number, date, amount, and time of the several bonds delivered, which receipt shall be delivered to the city comptroller, who shall charge the commissioner therewith.

SEC. 9. For the purpose of funding or paying the present indebtedness of the city, it shall be the duty of said commissioner to make sales of the bonds in his hands upon the most favorable terms he can obtain, and with the proceeds thereof may purchase such bonds of the city as are due or such as have not more than three years to run at the time of the purchase.

SEC. 10. He shall have power to purchase all outstanding warrants that have been duly presented to the treasurer, and all city bonds not having over three years to run as aforesaid, and in consideration thereof may sell to the owner or owners of said indebtedness any bond or bonds that may be in his hands, and may receive or pay in cash any
26 difference that may exist in said negotiation.

SEC. 11. Said fund commissioner shall not be authorized under the provisions of this ordinance to sell any bond in a sum less than one hundred dollars, nor shall he be authorized to dispose of the same at less than par value on one hundred dollar bonds, nor at a greater discount than five per cent. on five year bonds, and ten per cent. on ten year bonds.

SEC. 12. In the purchase of city indebtedness, the commissioner shall not pay any greater sum on demands due than the principal and interest accrued; and on demands not due, he shall not allow more than the par value of the debt, estimating the interest at ten per cent. per annum.

SEC. 13. It shall be the duty of the city clerk or comptroller to keep with the commissioner a correct and perfect account, charging him with all bonds delivered, and crediting him, upon the filing of his reports, with the indebtedness of the city cancelled by him, and with the discount of the bonds sold.

SEC. 14. The city clerk shall, immediately upon the receipt of any report from the commissioner, furnish the city treasurer with a copy thereof, which shall be filed in his office, and at the first meeting of the council after such report, it shall be submitted by the clerk to their inspection.

SEC. 15. The commissioner shall receive as a full compensation for

his services the sum of twenty-five dollars per annum, and in addition thereto one per cent. on the amount of bonds sold, for which warrants shall be ordered and drawn on the city treasurer.

SEC. 16. Should the commissioner at any time receive in cash as much as three hundred dollars, or more, from the proceeds of bonds sold, he shall deposit the same with the city treasurer, taking his duplicate receipts therefor, one of which shall be deposited with the comptroller, who shall credit the commissioner therewith.

SEC. 17. For the payment of the interest accruing, and the ultimate redemption of the bonds issued under the provisions of this ordinance, the faith of the city is pledged, and it is hereby made the duty of the city treasurer, annually, to set apart one-fourth of the whole nett
27 revenue of the city, to constitute a fund for the liquidation of said indebtedness.

Sec. 18. If the city council shall fail to make provisions for the payment of the bonds issued under this ordinance when they shall have matured, for twelve months after judgment obtained thereon against the city, it shall be lawful for the court before which judgment may have been obtained, on the application of the creditor, to make and enter up any such orders, decrees, and appointments as may be necessary to provide for the levying, assessing, and collecting a special tax on the taxable property of said city, not exceeding one-half of one per centum per annum, to be applied to the payment of said judgment, until the whole amount thereof shall be paid.

SEC. 19. The bonds to be issued under the authority of this ordinance and for the purposes therein mentioned, shall have printed on the back of such bonds a fair and correct copy of extracts of so much of the city charter as authorizes the city to borrow money, and of so much of this ordinance as relates to the appointment, duties, and powers of the "fund commissioner," which copies or extracts shall be certified to by the clerk of the city council, under the seal of the city.

SEC. 20. This ordinance shall take effect and be in force from and after the 1st day of March, 1867.

Passed and approved January 8th, 1867.

WILLIAM C. ORR, *Mayor.*

Attest:

B. F. HESSER, *Clerk C. C.*

That by authority of its charter, the defendant, in the year 1868, duly appointed one James E. Carstarphen fund commissioner under said ordinance, which appointment the said Carstarphen then and there accepted, and from thence until the month of July, 1875, he held said office and exercised and performed the functions thereof; that on the 1st day of March, 1871, the said fund commissioner made a report to said city council, in which he informed said council that the defendant's bonded indebtedness was then about one hundred
28 and fifty thousand dollars, bearing interest mostly atten per cent. *per cent.* per annum, and that about one hundred thousand dollars thereof would mature that year, and in the years 1872, 1873, 1874, and 1875; that said city council afterwards duly passed another ordinance, being ordinance No. 612, approved by the mayor March 18th, 1871, which ordinance No. 612 is as follows, viz:

ORDINANCE No. 612.

Be it ordained by the city council of the city of Louisiana, as follows, to wit:

SEC. 1st. The fund commissioner of the city of Louisiana is hereby authorized to negotiate the bonds of the city for the purpose raising money to liquidate the city debt, for a period not exceeding fifteen years, and at a rate of discount not exceeding fifteen per cent., any ordinance of the said city to the contrary notwithstanding.

This ordinance shall take effect and be in force from and after its passage.

WM. PARKER, *Mayor.*

Passed March 18th, 1871.
Attest:

N. H. GRIFFITH, *Clerk C. C.*

That on or about the 16th day of July, 1872, and after the 28th day of March, 1872, the defendant, which was then owing divers interest-bearing debts, amounting in the aggregate to over one hundred and fifty thousand dollars, for the purpose of raising money to pay its said debts, and the expenses of its government, caused to be executed by its proper officers, and to be sealed with its corporate seal, divers negotiable coupon bonds, and among others the twenty-one bonds described in the first four counts of the plaintiff's amended petition herein, one of said twenty-one bonds, to wit, bonds numbered 101 (the other twenty differing from this only in their numbers), is in the words and figures as follows, to wit:

29 No. 101.] UNITED STATES OF AMERICA. [$1,000.

Bond of the city of Louisiana, State of Missouri.

Interest ten per cent. per annum.

Know all men by these presents, that the city of Louisiana, in the State of Missouri, is indebted to or bearer, in the sum of one thousand dollars, lawful money of the United States of America, which the said city of Louisiana promises to pay on the first day of January, 1887, at the Ninth National Bank, in the city of New York, with interest thereon at the rate of ten per cent. per annum, payable semi-annually on the first days of January and July in each year, upon presentation and surrender of the annexed coupons as they severally become due and payable. This bond is issued by the city of Louisiana under authority of the general assembly of the State of Missouri, entitled "An act to amend an act entitled 'An act to amend and reduce into one the several acts incorporating the town of Louisiana, and to organize the same into a city,'" approved March 14th, 1849, and the several acts amendatory thereof, approved March 12, 1870; also an ordinance of the city council of the city of Louisiana, No. 525, passed January 8, 1867.

In witness whereof, the city of Louisiana has caused its seal to be hereto affixed, and the same to be signed by the mayor, countersigned by the clerk of the city council, at the city of Louisiana, Missouri, the first day of January, in the year of our Lord eighteen hundred and seventy-two.

[SEAL.]

WM. PARKER,
Mayor of City of Louisiana, Mo.

Countersigned:
N. H. GRIFFITH,
Clerk City Council.

That although the said bonds were made and executed after the law of the 28th of March, 1872, requiring the registration of bonds issued by cities, counties, and incorporated towns in this State took effect, yet the defendant for the purpose of evading the provisions of said registration law, and with the intent to make it falsely appear that said
30 bonds were not subject to the requirements of said law, caused said bonds to be ante-dated as of the 1st day of January, 1872, and caused it to be falsely stated in them that they were signed, countersigned, and sealed on the day last named.

That the defendant, in the further execution of its said purpose of raising money with which to pay its said debts and expenses, placed the said twenty-one bonds in the petition mentioned, together with divers others of the same issue, in the hands of the said fund commissioner for sale at not less than eighty-five cents on the dollar, without having them registered as required by said registration law; and the said fund commissioner afterwards, by and through the agency of a reputable stock and bond broker, in the city of St. Louis, chosen by himself for the purpose, sold and delivered all of said twenty-one bonds, but without previous registration, to the hereinafter-named purchasers thereof, and at the several times received from the purchaser the purchase price thereof, that is to say, on the 25th day of August, 1873, he sold and delivered to the plaintiff ten bonds, to wit, the ten mentioned and described in the first count of said petition for the sum of nine thousand dollars, being ninety cents on the dollar, which the plaintiff then and there paid and delivered to the said broker; on the 1st day of September, 1873, he sold and delivered to the plaintiff nine other bonds, to wit, the nine mentioned and described in the second count of said petition, for the sum of eight thousand one hundred dollars, being ninety cents on the dollar, which the plaintiff then and there paid and delivered to the said broker; on the 24th day of June, 1873, he sold and delivered to one Lewis Dorsheimer one other bond, to wit, the bond mentioned and described in the third count of said petition for the sum of nine hundred dollars, being ninety cents on the dollar, which the said Dorsheimer then and there
31 paid and delivered to said broker; and on the 24th day of February, 1874, he sold and delivered to one John F. Gibbons the other one of said twenty-one bonds, to wit, the bond mentioned and described in the fourth count of said petition for the sum of nine hundred dollars, being ninety cents on the dollar thereof, which the said Gibbons then and there paid and delivered to the said broker; that at the time the plaintiff and the said Dorsheimer and the said Gibbons respectively made their said purchases and paid their money to said broker, they were and each of them was wholly ignorant of the fact that said bonds were made and issued subsequently to the taking effect of said registration law, and that they had been ante-dated, and that the said recitals thereof were false, or of any fact that would invalidate them, but on the contrary thereof they and each of them accepted the said bonds by them respectively bought, and paid and advanced their money therefor in good faith, believing said bonds to be what they on their face professed to be, and to be obligatory on the defendant.

That the said Dorsheimer and the said Gibbons afterwards, each for himself, on the 5th day of April, 1875, for value, sold, transferred, and delivered the one said bond No. 77, and the other said bond No. 121 to Messrs. P. F. Kelleher & Co., and on the said last named day the said P. F. Kelleher & Co., for value, sold, transferred, and delivered said last named two bonds to the plaintiff; that while said bonds remained unsold the city council of the defendant was cognizant of the fact that said fund

commissioner was employing the services of brokers in effecting sales of them and made no objection thereto; that the said broker, with the assent of said fund commissioner, retained out of the moneys so realized from said sales for his services in the premises a sum equal to five per cent. of the par value of the bonds sold, and the residue thereof, equal to eighty-five per cent. of such par value, he paid and delivered to said fund commissioner, who used and applied, the same as follows, viz: part
32 and parcel thereof he used and applied, with the sanction of the said city council, in the payment and redemption of divers mature bonds, coupons and city warrants of the defendant, and the rest and residue of the funds so coming to the hands of said commissioner from said broker he paid and delivered to the city treasurer of the defendant.

That said fund commissioner in due time and from time to time made written reports to said city council, and presented therewith his accounts with the city, showing the sale, among others, of the said twenty-one bonds, and in which he charged himself, in respect of said twenty-one bonds, with a sum equal to eighty-five per cent. of their par value, as the sum realized by him on their sale, making no mention of the sum retained by the broker for his services, and showing also his disbursements of said funds in manner aforesaid; and said commissioner submitted with his said accounts as vouchers thereto, the several bonds, coupons, and warrants so by him paid and redeemed, and the said city council received and examined said reports and accounts and approved and settled the same, and recognized the application of said moneys in the said payments and redemption as aforesaid of the city bonds, coupons, and warrants as valid disbursements of said moneys, and the said council then and there received and burned and destroyed the said bonds, coupons, and warrants so by said commissioner redeemed and paid, and reported; that the defendant from time to time, as the same became due, paid the interest down to and inclusive of the 1st day of July, 1875, accruing on said twenty-one bonds, and of the interest which became payable the 1st of January, 1876, the defendant paid forty per cent. thereof and no more; when the instalment of interest due July 1, 1876, became payable, the defendant refused to pay the same, and declared its purpose not to pay said twenty-one bonds, principal or interest, or any part thereof, because as claimed by the defendants, the said bonds were invalid and void by reason of there not having been
33 registered as required by said registration law, and the defendant wholly repudiated said twenty-one bonds for the cause aforesaid, and has never since made other or further payment of principal or interest on said bonds, and denies its obligation to pay; that when said payments of interest were made the proper coupons were detached from the bonds, and were retained as vouchers by the treasurer paying.

The city treasurer showed the payment by him of these coupons in divers settlements of his accounts with the defendant, presented to said city council from time to time, accompanied by the coupons so paid, as vouchers thereto, which payments were approved by said council, and the coupons so paid and presented as vouchers were in every instance then and there destroyed by said council by burning; that said bonds were never registered as required by said regulation law of 28th March, 1872, and they were and are therefore invalid and void; that the defendant by force of its charter and laws amendatory thereof has power to borrow money and to issue its negotiable registered bonds therefor, and that the plaintiff before the institution of this suit, and after the defendant's said repudiation of said bonds, to wit, on the 22d day of February, 1878, offered to return and deliver up to the defend-

ant the said twenty-one bonds, and then and there demanded the repayment to the plaintiff of the said several sums so paid to the defendant for said bonds by the said purchasers thereof, and that the defendant refused said demand, and never repaid said moneys or any part thereof. And upon these facts the court finds that the plaintiff hath suffered damage for which the defendant is answerable, and the court doth now assesss the said damages so sustained by the plaintiff by reason of the premises at the sum of twenty-two thousand two hundred and twenty-six dollars and forty cents ($22,226.40).

Judgment.

It is therefore considered by the court, in accordance with said special finding, that the plaintiff, Thomas J. Wood, have and recover
34 against said defendant, the city of Louisiana, as well the said sum of twenty-two thousand two hundred and twenty-six dollars and forty cents, the damages aforesaid by the court assessed, as also the costs herein laid out and expended, and have thereof execution.

And thereupon said defendant by its attorneys files motion for a new trial herein, which being by the court considered, it is ordered that said motion be, and the same is hereby overruled. Whereupon leave is granted defendant to file its bill of exceptions in sixty days nunc pro tunc as of this date.

And afterwards, on the 20th day of December, 1878, the following proceedings were had in said case, to wit:

Bill of exceptions allowed.

THOMAS J. WOOD, PLAINTIFF,
vs.
CITY OF LOUISIANA, DEFENDANT.

Now comes the defendant by its attorneys, and presents its bill of exceptions, which is allowed, signed, and ordered to be filed as a part of the record herein.

And afterward, in vacation of said court, on the 3rd day of February, 1879, the following proceedings were had in said case, to wit:

Writ of error allowed.

THOMAS J. WOOD, PLAINTIFF,
vs.
CITY OF LOUISIANA, DEFENDANT.

Now comes the defendant, by its attorneys, and presents to the court a writ of error to remove this cause to the Supreme Court of the United States, and a citation, citing and admonishing the said plaintiff to be and appear at a Supreme Court of the United States at the next term thereof on the second Monday of October next, which said writ of error is allowed and said citation signed by the judge.

Bond approved.

And the said defendant also presents to the court its bond in

35 the penal sum of five hundred dollars, which bond is approved and ordered to be filed.

The said bill of exceptions is in the words and figures following, to wit:

Bill of exceptions.

In the circuit court of the United States, in and for the eastern district of Missouri. Sept. term, 1878.

THOMAS J. WOOD, PL'FF,
vs.
THE CITY OF LOUISIANA, DEF'T.

Be it remembered, that at the said September term of said circuit court of the United States, in and for said eastern district of Missouri, this cause came on to be heard before the court, both parties waiving a jury, and after hearing the evidence, the court finds the facts and gives its conclusions as follows:

(The said finding is inserted on page 24 and following.)

To which conclusion and judgment of the court the defendant at the time excepted.

Defendant then, on the same day, filed its motion for a new trial, which is as follows:

Motion for new trial.

In the circuit court of the United States, in and for the eastern district of Missouri.

THOMAS J. WOOD, PL'FF,
vs.
THE CITY OF LOUISIANA, DEF'T.

Now, at this day, comes the said defendant, and moves the court to set aside the verdict and judgment herein, and grant it a new trial herein, for the following reasons:

1st. The court admitted illegal and improper evidence for the plaintiff, and excluded legal and proper evidence for the defendant.

2nd. The finding of the court is contrary to the facts.

36 3rd. The finding and judgment is contrary to the law and the evidence.

4th. The finding and judgment is for the plaintiff, when it should have been for the defendant.

WAGNER, DYER & EMMONS,
For Def't.

Which the court overruled, to which action of the court in overruling said motion defendant then and there at the time excepted, and it now prays that its bill of exceptions may be signed and sealed by the court, and be made a part of the record, which is accordingly done this 20th day of December, 1878.

[SEAL.] SAMUEL TREAT, *Judge.*

And the said bond so approved as aforesaid is in the words and figures following, to wit:

Bond.

Know all men by these presents, that we, The City of Louisiana, as principal, and G. L. Bralley and A. J. McCune as sureties, are held and firmly bound unto Thomas J. Wood in the full and just sum of five hundred dollars, to be paid to the said Thomas J. Wood, his heirs, executors, administrators, or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents. Sealed with our seals, and dated this third day of February, in the year of our Lord one thousand eight hundred and seventy-nine.

Whereas lately, at the September term, 1878, of the circuit court of the United States for the eastern district of Missouri, in a suit depending in said court, between Thomas J. Wood, plaintiff, and the city of Louisiana, in the State of Missouri, defendant, judgment was rendered against the said defendant for the sum of twenty-two thousand two hundred and twenty-six dollars and forty cents, and the said defendant having obtained a writ of error of the said court to reverse the judg-
37 ment in the aforesaid suit, and a citation directed to the said Thomas J. Wood, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next:

Now, the condition of the above obligation is such, that if the said city of Louisiana, the defendant, shall prosecute said writ to effect, and answer all costs if it fail to make good its plea, then the above obligation to be void, else to remain in full force and virtue.

[CORPORATE SEAL.] THE CITY OF LOUISIANA,
By WM. PARKER, *Mayor*. [SEAL.]
G. L. BRALLEY. [SEAL.]
A. J. MCCUNE. [SEAL.]

Approved by—
SAMUEL TREAT, *Judge*.

The following opinion was delivered by the honorable Samuel Treat, judge, who presided at the trial of said cause:

Opinion.

THOMAS J. WOOD, PLAINTIFF,
vs.
CITY OF LOUISIANA, DEFENDANT.

This is a suit for money had and received by the defendant from the plaintiff and plaintiff's assignors.

The officers of the defendant, in order to evade the act of March, 1872, requiring registration, antedated certain bonds, which subsequently were bought by the plaintiff and his assignors, in open market, at ninety cents on the dollar. Those bonds were void for non-registry. If they had not been antedated—that is, if they had been executed and issued, in fact, as on their face they purported to have been, they would have been valid and obligatory. As the city had power to borrow money for the purposes defined in its charter, is it to be held liable
38 for the money thus borrowed, through sale of bonds, which were void from non-compliance with the registry act? The fraudulent contrivances of the defendant's agents, whereby, through invalid bonds,

they obtained the money of the plaintiff and his assignors, ought not to preclude the plaintiff from recovery, if he was a bona fide holder for value, to the extent that the defendant actually received the money therefor, provided there was lawful authority to borrow money for the purpose for which the same was received and used.

If money was obtained by the defendant through such invalid contrivances, and the same could have been lawfully borrowed in another manner, and if the money thus procured was received and used for lawful purposes, why should not the defendant be held liable? The bonds, as stated, were invalid, as such, and no suit could be maintained thereon. They were bought innocently in the open market, from the duly constituted and recognized agents of the defendant, at the rate named; and the net sum received (eighty-five cents on the dollar) passed into the city treasury, and was disbursed for lawful purposes. Full and detailed reports of receipts and disbursements concerning the same were made from time to time, and received the sanction of the mayor and city council. There is no doubt that the plaintiff, as to all except two of the bonds, bought them directly from the city's agents, at the rate named, and paid to said agents accordingly. As to the other two bonds, the facts are that they were sold under like circumstances to the respective assignors of the plaintiff, at the same rate, and subsequently bought of said assignors, bona fide, for the same price.

It is of the first importance to bear in mind, however, that the city could not borrow nor expend money, except when authorized by
39 its charter and the law. It cannot set up the fraudulent or unlawful contrivances of its agents, whereby plaintiff's money was procured and used for lawful purposes, as a defence in this action, if the plaintiff or purchaser was not in pari delictu as to said wrongful conduct.

As to the bonds bought not directly from defendant's agent, the assignee is subrogated to the rights of the assignor. This has been settled in this circuit; and, if not directly adjudged, at least broadly intimated by the United States Supreme Court.

The next inquiry is not free from doubt. The fund commissioner was not to sell the bonds for less than eighty-five per cent. of their face value. He did pay that sum to the defendant, five per cent. having been used for commissions and expenses of sale. The city was prohibited from increasing its debt, but was bound to meet its existing indebtedness. To meet that indebtedness and current expenses, including the expenses of negotiating this loan, or borrowing the sum needed, the plaintiff's ninety per cent. was received. That sum, therefore, was had and lawfully applied, and the defendant must answer therefor. Of course the plaintiff can receive only at the rate of six per cent. on the sum so advanced by him or his assignor from the date when payment of interest ceased.

It is unnecessary to distinguish more clearly this case from one where, through the fraudulent acts of a municipal agent, money has been procured by him for unlawful purposes, or through him passed to the municipality for unlawful objects and been so used. The doctrine, not of fraud alone, would, in such cases, have to be considered with reference to the respective parties, but also the question of ultra vires.

The case before the court is, in its worst aspect, simply this, to wit, a procurement through unlawful means of a given sum of money, which was received by the principal and by the latter lawfully used, the
40 lender being innocent that the means used were invalid.

A municipality can exercise no powers not conferred upon it,

nor can it resort to fobidden means to accomplish a prohibited result. It necessarily acts through agents, and it is important that such agents should be restricted in their agency to prescribed modes of action. But suppose they violate said prohibitions, or transcend, wilfully, the restrictions imposed on them, yet the fruits thereof, being received by them, are applied to the lawful objects of the municipality; and suppose the lender, in ignorance of any fraudulent devices of the kind, parts with his money in good faith, and the municipality has had and used the money so procured for lawful purposes, or still has it in its treasury, shall it refuse to refund the same?

It is not necessary to go into an inquiry in this case as to matters wherein an agent, on one side, and the party dealing with him, on the other, are in pari delictu. Here we have the recognized agents of the city undertaking to raise funds for lawful purposes, and by ante-dating the bonds, raising said funds, giving, as evidence of the money borrowed, bonds which, for statutory reasons, could not be enforced as bonds. The purchaser of said bonds, or (what is the same) the lender of the borrowing city, parted with his money, which the city received and lawfully used, although the purchaser or lender received as evidence of what he advanced the bonds, on which he could not recover directly; is he therefore to lose the money so by him loaned and used by the city?

One who deals with a municipality must be sure that it is act-
41 ing within its corporate limits. If its agents are acting beyond such powers, he deals at his peril. If the municipality has the power to raise funds for prescribed purposes, but is forbidden to raise them in the manner adopted by its agents, shall the lender hold the city liable, as for money had and received, notwithstanding through prohibited means used by its agents the funds having come into its possession?

Here a technical difficulty is encountered. If the lender knows that the means are unlawful (taking cognizance of the law as to said means), shall he have the aid of the court to recover? But if, through the designed fraud of the city's agents, he is innocently misled into the purchase of the bonds, which on their face are outside of the prohibitions of the statute, and the city receives the avails thereof, and uses such avails in a lawful way, shall he be remediless?

The broad distinction must be recognized between an effort to enable a municipality to exceed the limits fixed to its indebtedness, and a resort to prohibited means to raise funds for a lawful purpose. It was a positive requirement that the obligations of the city should not exceed a specified amount, with exceptions as to past indebtedness. It was also a positive requirement that future bonds should be registered in conformity with the act of March, 1872.

It appears from the evidence that the bonds in question, heretofore pronounced invalid for non-registry, were the means through which plaintiff's money went into the treasury of the city, and was used for lawful purposes, and it appears also that the purchaser of the bonds did not know of the false ante-dating. The rules invoked concerning the relationship of vendor and vendee, in open market, as to municipal bonds, cannot affect this case; for those rules pertain solely to
42 vendors (other than the obligors) and their vendees. The obligors' liability still remains, and depends on considerations entirely distinct from those arising between an ordinary vendor and vendee.

This is a suit as between the obligor of the bond and the assignee thereof. The bond being for statutory reasons void, the assignee is not

protected by the law-merchant. The equities of the original transaction are open, and evidence thereon has been had. The assignee being subrogated to all the rights of the first assignor, may recover from the obligor what he, that assignor, actually paid, and no more. He cannot recover on the bond, because that was invalid, and hence not obligatory, but is remitted to a recovery of what the city actually received from the first vendee of the bond. If ninety cents on the dollar were paid, as heretofore stated, that is the amount of the recovery, with six per cent interest on what is due.

43 UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

I, M. M. Price, clerk of the circuit court of the United States in and for the eastern district of Missouri, do hereby certify that the writing hereto attached to be a true copy of the record and proceedings had in case No. 1184 of Thomas J. Wood, plaintiff, against The City of Louisiana, defendant, as fully as the same remain on file and of record in said case in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office in the city of St. Louis, in said district, this 19th day of May, in the year of our Lord eighteen hundred and seventy-nine.

[SEAL.]

M. M. PRICE,
Clerk of said Court,
By A. P. SELBY, *Deputy.*

(Indorsement on cover:) No. 515. The City of Louisiana, in the State of Missouri, pl'ff in error, vs. Thomas J. Wood. E. Missouri C. C. U. S. Filed 23d September, 1879.

O

APPENDIX TO BRIEF AND RECORD.

THE CITY OF LOUISIANA,
Plaintiff in Error.
vs.
THOMAS J. WOOD,
Defendant in Error.

In the Supreme Court of the U. S., October Term.
No. 515.

IN ERROR TO THE EASTERN DISTRICT OF MISSOURI.

On the second day of October, 1878, before the trial in the Circuit Court, the Attorneys of record filed with the Clerk of said Circuit Court a stipulation in writing waiving a jury in this cause; which stipulation remains in said Circuit Court among the files of the cause, and is in the words and figures following, to-wit:

"THOMAS J. WOOD, *Plff.*
vs. No. 1184.
CITY OF LOUISIANA, *Deft.*

In the U. S. Circuit Court, Eastern District of Mo. Sept. Term, 1878.

By consent of parties, a jury is waived in this case. Sept. 17th, 1878.

DRYDEN & DRYDEN,
Atty's for Plaintiff.

WAGNER, DYER & EMMONS,
Atty's of Defendant."

Now, as said Clerk inadvertantly omitted the said stipulation from the record certified to this Court, in order to supply said omission without expense or delay, the parties to the cause hereby stipulate and agree that the Court may use and consider said stipulation as hereinbefore set out, and give it the like force and effect as if the same was comprised in the record so certified by said Clerk, and that neither party shall suffer harm by the omission. Each party will accompany his brief with a printed copy of the agreement, and the original will be filed and preserved in the office of the Clerk of the Supreme Court.

DAVID P. DYER,
Att'y for Plaintiff in Error.

JOHN D. S. DRYDEN,
Att'y for Defendant in Error.

August 16th, 1880.

SUPREME COURT U.S.
FILED
NOV 1 1980
JAMES R. McKENNEY, Clerk

Supreme Court of the United States.

No. 515.

THE CITY OF LOUISIANA, *Plaintiff in Error*,

vs.

THOMAS J. WOOD, *Defendant in Error*.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

BRIEF AND ARGUMENT.

DAVID P. DYER,
Attorney for Plaintiff in Error.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1880.

THE CITY OF LOUISIANA,
Plaintiff in Error.
vs.
THOMAS J. WOOD,
Defendant in Error.
} CASE NO. 515.

STATEMENT OF THE CASE FOR THE PLAINTIFF IN ERROR.

The City of Louisiana was incorporated on the 12th day of March, 1870, by an act of the General Assembly of the State of Missouri, entitled "An act to amend an act entitled an act to amend and reduce into one the several acts incorporating the Town of Louisana, and to organize the same into a City."

(Session Laws of Mo., 1870, page 386.)

On the 30th of March, 1872, the Legislature passed and the Governor approved an act, entitled "An act to provide for the Registration of Bonds issued by Counties, Cities and Incorporated Towns."

(Session Laws of Mo.; Adjourned Session, page 56.)

This act took effect from and after its passage.

The 4th Section of said act is as follows:

SEC. 4. Before any bond hereafter issued by any county, city or incorporated town, for any purpose whatever, shall obtain validity or be negotiated, such bond shall first be presented to the state auditor, who shall register the same in a book or books provided for that purpose, in the same manner as the state bonds are now registered, and who shall certify by indorsement on such bond that all the conditions of the laws have been complied with in its issue, if that be the case, and also that the conditions of the contract under which they were *ordered to be issued* have also been complied with, and the evidence of that fact shall be filed and pre-

served by the auditor; but such certificate shall be *prima facie* evidence only of the facts therein stated, and shall not preclude or prohibit any person from showing or proving the contrary in any suit or proceeding to test or determine the validity of such bonds, or the power of any county court, city or town council or board of trustees, or other authority, to issue such bonds; and the remedy of injunction shall also lie at the instance of any tax-payer of the respective county, city or incorporated town, to prevent the registration of any bonds alleged to be illegally issued or funded under any of the provisions of this act.

On the 8th day of January, *1867*, the City of Louisiana passed an Ordinance providing for the issue of certain bonds, (See page 13 of transcript) and in *1873* under the provisions of said ordinance, 21 bonds for 1000 dollars each, bearing interest at the rate of ten per cent. per annum, payable semi-annually were made, but *antedated* as of January 1st, 1872. These bonds were sold in open market to the Defendant in Error, Thomas J. Wood, in August, 1873, at 90 cents on the dollar by P. F. Kelleher a stock and bond broker in the City of St. Louis.

The petition in this case states, (page 3 of transcript) and the Court found (page 17 of the transcript) the City through its officers, "with intent to make it falsely appear that said bonds (meaning those above named) were not subject to the requirements of said law, (act of March 30th, 1872.) caused said bonds to be antedated as of the first of January, 1872, and caused it to be falsely stated in them that they were signed, countersigned and sealed on the day last named."

The power to raise money by taxation, and to borrow money on the credit of the City is contained in the following sections and parts of sections of said charter:

"Article I, Sec. 2. The City Council shall have power within the City, by ordinance—*First*, To levy and collect taxes not exceeding one-and-one-half of one per centum per annum upon all property made taxable by law for State purposes, and to provide for the collection of same by sale of real and personal estate in such manner as the Council, by ordinance, may provide.

Second, To borrow money on the credit of the City."

"Article VI, Sec. 22. It shall be lawful for the City to borrow money at any rate of interest *not exceeding ten per cent. per annum*."

"Article III, Sec. 2. * * * Forty-third. To make all ordinances not inconsistent with the laws of the State which

shall be necessary and proper for carrying into effect the powers specified in this section, and all other powers vested by this act in the Corporation, the City Government, or any department or office thereof."

On the 23d day of February, 1878, Thomas J. Wood, the Defendant in Error in this case, commenced suit in the Circuit Court of the United States for the Eastern District of Missouri, to recover judgment on certain past due coupons detached from the said twenty-one bonds. On the trial of that cause the Court held that the bonds from which said coupons had been detached were void for want of registration required by the 4th section before recited of act of March 30, 1872, and that no recovery could be had on said coupons. From this decision the said Wood sued out a writ of Error to the Supreme Court of the United States where said cause, numbered 156 in said Court, is still pending and undetermined. Pending a decision in that case the said Wood, Defendant in Error herein but Plaintiff in Error therein, instituted in the United States Circuit Court for the Eastern District of Missouri, this suit, to recover of the City of Louisiana as for money loaned, with a count in the petition praying judgment as for money had and received. Among other averments in said petition is the following, (see page 3 of transcript) the bonds (meaning those bought by him of Kelleher & Co. in open market, "were subject to the requirements of said act and without registration and indorsement were void and of no force or effect as obligations of said city for any purpose whatever."

The City defends on the following grounds:

1. That the act of March 30, 1872, was a public act, the provisions of which had to be noticed by all persons dealing with the city. That the negotiation of said bonds without the same being registered as required by the 4th Section of said act was prohibited by the statute and directed against the purchaser as well as the city. That the city had no right to issue or negotiate the bonds after the 30th of March, 1872, without first having them registered and indorsed, and that the Defendant in Error by accepting the same and negotiating with the city therefor in direct violation of the statute can not now recover back the money paid for said bonds.

2. There can be no recovery of the money back on the ground that it was a loan to the city. The charter of the city gave the council "power to borrow money on the credit of the city" but prohibited it from doing so at any rate of interest exceeding ten

per cent. per annum. That when the city agreed to pay and for more than three years did pay interest at the rate of ten per cent. per annum, semi-annually on twenty-one thousand dollars to the Defendant in Error when he had paid only eighteen thousand nine hundred dollars for the bonds, he in this way became a party himself to the violation of a law written across the face of the bonds he sought to purchase.

3. There can be no recovery on the ground that the bonds were negotiated to the defendant under ordinances 525 and 612, and that the money derived from their sale was used in funding or paying off the indebtedness of the city, for the reason that no such power existed in the City Council at the time of the issue of said bonds.

The act of March 30, 1872, above recited, provided the only manner of funding the debt of the city and there is no pretence that the city authorities attempted to comply with that act.

The Eleventh Section of said act is as follows:

"Any county, city or town that desires to place its outstanding indebtedness, under the provisions of this act, may do so by funding the same and issuing new bonds in lieu of the present ones, upon such terms and bearing such interest, with such length of time to run, as may be agreed upon between the county, city or town and the holder of the bonds; *Provided*, however, that the contract for funding, with the terms of the same, shall be assented to by a majority of the qualified voters of such county, city or town, at a general or special election held therefor, and at least thirty days' public notice of the same shall be published in every paper in the county, city or town, and when there are none, then by four printed hand-bills put up in the most public places in every voting precinct in such county, city or town"

The only other way provided by law for the settlement of such indebtedness is contained in the charter of said city, authorizing the levy and collection of taxes—the provisions for which have been before copied.

The Court made a special finding of facts in the case and rendered judgment for the plaintiff for the sum of $22,226.40.

ERRORS ASSIGNED.

1. The Circuit Court erred in finding for the plaintiff below upon the statement of facts set out in the transcript.

2. The Court erred in holding that the facts found showed a

contract either express or implied between the plaintiff and defendant for the borrowing of money.

3. The Court erred in holding that the City of Louisiana under the charter had the legal right to borrow money on the terms or in the manner stated in the pleadings and shown by the proofs.

4. The furnishing of money by the plaintiff to the agents of defendant under the circumstances and on the terms shown by the evidence, was in violation of the Charter of the City of Louisiana and can not be recovered back as for money had and received to the use of the defendant.

POINTS AND AUTHORITIES.

The Registration Act referred to was approved on the 30th of March, 1872, and the 4th section of the act declared that no bond thereafter issued should obtain validity *or be negotiated* until it had been registered. The object of the statute is perfectly plain. It was to furnish evidence to the purchaser or party negotiating with the municipality that the law had been complied with in its issue, and, also, to ensure to the municipality, by proof before the Auditor, that the conditions of the contract under which the bonds were ordered to be issued had been complied with, and to protect the the people against the frauds and peculations of its own officers or agents.

The bonds being *ante-dated* and, in fact, issued after the passage of the act referred to, the Court held that the bonds were invalid.

If the true date of the execution of the bonds had been stated on their face it would not be pretended that the defendant, by purchasing bonds not registered, and in this way made himself a party to the open violation of the law, could have recovered the money back which he had paid for them.

But it is claimed that the purchaser was deceived in regard to the date *of the issue* by the date at which the bonds, on their face, bore date, and if the *execution* or *the mere signing of the bonds* and the *issue* of the bonds was the same thing, then there would be some foundation for this claim, because the law applies to bonds "*hereafter issued*"—that is, issued after the passage of the act; but it is submitted that *issue* means to send out, to go out, to deliver.

The mere making of the bonds amounts to nothing, and neither the municipality nor any one else is bound by them. They were not valid, that is, binding upon the municipality for any purpose,

until they were sold and issued to the purchaser. The law evidently was to prevent bonds being put upon the market unless they were first registered and the safe-guards thrown around them which are provided for by the Registration law. The purchaser was bound to know of the existence of the law at the time he bought the bonds If the bonds had been executed by the City under a contract with a railroad company or other person under which it bound itself to issue and deliver certain bonds for a certain consideration, then the law could not apply, because it would be interfering with the obligation of a contract made before its passage; but that was not the case here. There was no contract nor any obligation to issue or deliver the bonds.

These considerations address themselves to the question as to whether the person who bought the bonds or lent the money was innocent, that the means used were invalid, and if the law was that the bonds could not be sold and issued after the passage of the act without registration, the purchaser will be presumed to know that fact, and thereby becomes a party to the illegal transaction.

The agent who ante-dated the bonds might, in a proper action against him, be made liable to the purchaser; but we submit that the agent who exceeds his authority, and, in doing so, practices a fraud upon a third person, cannot bind the municipality by his acts; nor will it do to say that the City afterwards ratified his acts by receiving the money, for the act of receiving the money was done by agents, and they had no authority to ratify an illegal act. It is very clear that no acquiescence would make the *bonds* valid.

In Marsh vs. Fulton County, 10 Wallace, 684, "The power of ratification (the Court says) did not lie with the supervisors. A ratification is, in its effects upon the acts of an agent, equivalent to the possession by him of previous authority. It operates upon the act ratified in the same manner as though the authority to do the act existed originally; and it follows that a ratification can only be made when the party ratifying possesses the power to perform the act ratified."

If the doctrine contended for in this case be correct, then *any* illegal act done by the agents of a municipal corporation may be made valid if the corporation should derive any benefit from it.

In the case of Thomas vs. The City of Richmond, 12 Wallace, page 356, the Court says:

"Municipal and other public corporations represent the public and are themselves to be protected against the unauthorized acts of

their officers and agents when it can be done without injury to third parties. This is necessary in order to guard against fraud and peculation. Persons dealing with such officers and agents are chargeable with notice of the powers which the corporation possesses, and are to be held responsible accordingly."

And again, "The protection of public corporations from such unauthorized acts of their officers and agents is a matter of public policy in which the whole community is concerned, and those who aid in such transactions must do so at their peril."

Judge Dillon, in his work on Municipal Corporations, says:

"It is scarcely necessary to observe that no contract can be made by a corporation which is prohibited by its Charter or by the Statute law of the State, and it is a general and fundamental principle of law that *all* persons contracting with a municipal corporation must, *at their peril, inquire into the power* of the corporation, or its officers, to make the contract; and a contract beyond the scope of the corporate power is void, although it be under the seal of the corporation. So, also, those *dealing with the agent* of a municipal corporation are likewise bound to ascertain the nature and extent of his authority. This is certainly so in all cases where the authority is special and of record, or conferred by statute. The fact in such a case that the agent made *false representations* in relation to his authority, and what he had already done, will not aid those who trusted to such representations to establish a liability on the part of his corporate principal."

1 Dill. on Mun Corp., sec. 372, and notes.

In the case of *Hackettstown v. Swackhamer, 37 N. J. L. 196*, in a suit against the town for borrowed money it was held that no recovery could be had because the town had no power to borrow. It was then insisted, because the town had received this money, that an action would lie for its recovery, but the Chief Justice, in delivering the opinion of the Court, says:

"Nor do I think that it adds anything to the right to enforce the note in this case, that the money which it represents, and was borrowed, has been expended in behalf of the corporation for legitimate purposes. The argument on this head was, that as the money had gone for the benefit of the corporation, the law, upon general principles, would compel repayment. If this is so, then the rejection of an implied power to borrow money is of little avail. The doctrine, although repudiated in the abstract, would be ratified in the concrete. If this contention is tenable, it is impossible to close

the eye to the fact that the loan, *although held illegal and void in its inception, would thus, by a subsequent act, be rendered valid and enforceable.*"

The only difference between the case last cited and this one is that in that case the charter conferred no authority on the council to borrow money, while the charter of the City of Louisiana did confer on the city council the power to borrow money, but prohibited it from doing so at a greater rate of interest than ten cent per annum.

The Defendant in Error not only had notice by the law itself, but by the recitals on the face of the bonds that the city had no authority to borrow at nor he to receive a greater rate than ten per cent per annum. Yet in the face of this Statute he made an agreement with an agent of the city to receive interest at the rate of ten per cent per annum on *twenty-one thousand dollars*, when according to his own showing he only loaned the city eighteen thousand, nine hundred dollars. He received this illegal and unauthorized interest for a period of three years and when the city refused to pay longer he asks for the money paid with six per cent from the time when the city ceased to pay at the rate of ten per per annum, and the court renders judgment according to the prayer in the petition.

To permit the plaintiff now to recover would be indirectly enforcing a claim which the law has declared absolutely void.

If this position can be made to appear, then there is no protection for municipal corporations. Their agents although forbidden by law to act, may proceed without authority, and although the Courts refuse directly to sanction the illegal act, yet if by changing the form of action, judgment can be rendered for the money and the interest, then the City is no better off.

In the case of Thomas vs. The City of Richmond, before referred to, Justice Bradley, speaking for the Court, says:

"It is contended, however, that although the notes themselves should be deemed void, yet the city received the money therefor, and ought not, in conscience, to retain it; and, therefore, that the action can be maintained on the count for money had and received. If the defendant were a banking or other private corporation, and had issued notes contrary to law, and had incurred penalties therefor, no penalty being imposed upon the receiver or holder of the notes, this argument might be sound."

"But in the case of municipal and other public corporations,

another consideration intervenes. They represent the public, and are themselves to be protected against the unauthorized acts of their officers and agents when it can be done without injury to third parties. This is necessary in order to guard against fraud and peculation. Persons dealing with such officers and agents are chargeable with notice of the powers which the corporation possesses, and are to be held responsible accordingly. The issuing of bills as a currency by such a corporation, without authority, is not only contrary to positive law, but, being *ultra vires*, is an abuse of the public franchises which have been conferred upon it; and the receiver of the bills, being chargeable with notice of the wrong, is *in pari delicto* with the officers, and should have no remedy, even for money had and received, against the corporation upon which he has aided in inflicting the wrong. The protection of public corporations from such unauthorized acts of their officers and agents is a matter of public policy, in which the whole community is concerned, and those who aid in such transactions must do so at their peril. According to these principles, no recovery could have been had against the city, either on the bills themselves or on a claim for money had and received. It was against the law of the state to issue them. It was a penal offense in both the person who paid and the person who received them, and they were issued by a municipal corporation which had no power, and which was known to have no power, to issue them."

In that case the law imposed a penalty upon the person issuing as well as the person receiving.

In this case the law prohibited the issue and negotiation of the bonds, or more correctly speaking, denounced as a penalty against such action, the invalidity of the paper given and received.

Shall the party aiding the agents of the city in the violation of the law be placed in a position to recover back the money because there was no *penal* offense denounced by the Statute?

Is he to be permitted to demand and receive an usurious rate of interest on the money claimed by him to have been loaned for a number of years and then when his action is ascertained to be illegal, to recover back the money paid?

Ordinances 525 and 612 of the City Council which are set out in full in the transcript were passed long before the registration act of 1872.

The ordinances provided for the *funding* of the city debt and so far as they attempted to authorize the discount of the bonds where

the city could be compelled to pay a greater rate of interest than ten per cent per annum on the amount received were illegal because the charter of the city prohibited it. But when the act of March 30th, 1872, went into effect, whatever authority the city had by virtue of its charter or these ordinances was repealed by the 11th section of said act which has been copied in full above.

There is no pretence that any action was ever taken under this section by the City of Louisiana, and it is clear, therefore, we submit that the ordinances above referred to gave no authority to issue bonds for any purpose whatever.

No action of the City Council was ever had authorizing its agents to *borrow* money, and without such action the agents or officers of the city were without authority to act.

The bonds in this case were not negotiable bonds, they had no validity whatever, and the purchaser of them in open market purchased just what he got, and nothing more.

The rule in regard to negotiable securities goes to the extent that the purchaser of negotiable paper having knowledge of previous infirmities from one who had no such knowledge, holds them freed from all infirmities attached to their original issue.

"The only exceptions to this doctrine are those where the paper is absolutely void, as when issued by parties having no authority to contract; as its circulation forbidden by law from the illegality of its consideration, as when made upon a gambling or usurious consideration."

Cromwell vs. County of Sac, 96 U. S., 51.

The acts of the City officers in the case seem to have been afflicted with all the infirmities known to the law.

1. Want of State Authority.
2. Want of Municipal Authority.
3. Want of Corporate Action.
4. Contract by parties having no authority to contract.
5. Contract in violation of Charter.
6. Contract in violation of general law.
7. Usurious contract.
8. For a forbidden purpose.
9. In violation of Registry Act.

In the case of Bayley vs. Tabor, 5 Massachusetts Reports, p. 285, the Court says:

"However hard the operation of the Statute may appear to be against persons into whose possession such notes may have come

bona fide, and for a valuable consideration, it is a hardship created by law for the public good, and the Courts of law are prohibited from granting any relief against it.

"Nor is it altogether certain that the receivers of such notes are free from blame, although not privy to the actual making or ante-dating of them. The laws of the Government are presumed to be known by all the citizens.

"If the notes were *in fact* made or issued after they were declared void by statute and after a penalty was attached to the passing of them, although no penalty is expressly enacted against the receiver; yet the act of receiving was necessary to enable the offender to pass them, and in this view, the receiver may be considered as having aided in the offence of passing. Nor is improbable that the Legislature contemplated the punishment of the receiver when they took from him all power of coercing payment of such notes in the Courts of law. But be this as it may, whether the plaintiffs in this action are innocent or not; to authorize them to maintain a suit and recover judgment on notes of this description so situated, when the Legislature has declared them to be utterly void, would be effectually to an annul act, the wisdom and policy of which the Legislature alone had the right to determine."

In the case of Anthony vs. Jasper County, 4th Dillon's Circuit Court, Reports page 145. Judge Dillon in his opinion, after quoting approvingly the case just cited, says:

"The principle involved is one of great consequence. For illustration, loose and general powers have been heretofore given in this State to municipalties and Counties to issue such bonds. This power has been taken away by the new Constitution. Can the protective provisions of that instrument be evaded and rendered useless by the mere fraudulent act of the officers of the County in ante-dating the bonds. If so the power to defraud is endowed with a fearful vitality which survives the prohibition of the Constitution and threatens to become immortal."

In the case of Zottman vs. San Francisco, 20 Cal. 96. Judge Field, in delivering the opinion of the Court, says: "That when the mode in which their power on any given subject is prescribed by their charter the mode must be followed. The mode in such cases constitutes the measure of their power."

Whatever the City Council of the City of Louisiana had authority to do, *it had to do by ordinance*, and there is no pretense that the City ever passed an ordinance authorizing the action taken by its

agents (except as shown by Ordinances 525 and 612), or ever by *ordinance* appropriated any money of the Defendant in Error to its own use.

Ordinances 525 and 612 being themselves in violation of the City Charter at the time they were passed, and entirely repealed by the 11th Section of the Act of March 30th, 1872, it follows that the "mode" pointed out in the Charter was never followed; and the "mode constitutes the measure of their power."

See also case of Herzo vs. San Francisco, 33 Cal., p. 134.
McPherson vs. Foster, 43 Iowa, 48–69.
McDonald vs. The Mayor, 68 N. Y., 23.

The attention of the Court is especially directed to the last case above cited as containing a learned discussion of the liabilities and duties of municipal corporations.

DAVID P. DYER,
Attorney for P. E.

APPENDIX TO BRIEF AND RECORD.

THE CITY OF LOUISIANA,
Plaintiff in Error.
vs.
THOMAS J. WOOD,
Defendant in Error.

In the Supreme Court of the U. S., October Term.
No. 515.

IN ERROR TO THE EASTERN DISTRICT OF MISSOURI.

On the second day of October, 1878, before the trial in the Circuit Court, the Attorneys of record filed with the Clerk of said Circuit Court a stipulation in writing waiving a jury in this cause; which stipulation remains in said Circuit Court among the files of the cause, and is in the words and figures following, to-wit:

"THOMAS J. WOOD, *Plff.*
vs. No. 1184.
CITY OF LOUISIANA, *Deft.*

In the U. S. Circuit Court, Eastern District of Mo. Sept. Term, 1878.

By consent of parties, a jury is waived in this case. Sept. 17th, 1878.

DRYDEN & DRYDEN,
Atty's for Plaintiff.

WAGNER, DYER & EMMONS,
Atty's of Defendant."

Now, as said Clerk inadvertantly omitted the said stipulation from the record certified to this Court, in order to supply said omission without expense or delay, the parties to the cause hereby stipulate and agree that the Court may use and consider said stipulation as hereinbefore set out, and give it the like force and effect as if the same was comprised in the record so certified by said Clerk, and that neither party shall suffer harm by the omission. Each party will accompany his brief with a printed copy of the agreement, and the original will be filed and preserved in the office of the Clerk of the Supreme Court.

DAVID P. DYER,
Att'y for Plaintiff in Error.

JOHN D. S DRYDEN,
Att'y for Defendant in Error.

August 16th, 1880.

OFFICE SUPREME COURT U.S.
FILED
NOV 1 1880
JAMES H. McKENNEY, Clerk.

In the Supreme Court of the United States.

THE CITY OF LOUISIANA, *Plaintiff in Error*,

v.

THOMAS J. WOOD, *Defendant in Error*.

Case No. 515.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

SUPPLEMENTAL BRIEF OF PLAINTIFF IN ERROR.

D. P. DYER,
Attorney for Plaintiff in Error.

In the Supreme Court of the United States.

THE CITY OF LOUISIANA, *Plaintiff in Error*,

v.

THOMAS J. WOOD, *Defendant in Error*.

Case No. 515.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

SUPPLEMENTAL BRIEF OF PLAINTIFF IN ERROR.

The learned counsel for defendant in error insist in their brief filed herein that the errors assigned by the plaintiff in error herein, present no questions that can legitimately arise upon the record, and that no objection not going to the sufficiency of the facts found by the special verdict to uphold the judgment, is pertinent, or can be of any avail. Nevertheless they have, in their brief, replied to the objections raised by the plaintiff in error to the sufficiency of the facts in the special finding of the Court, and to the end that there may be no misapprehension as to the errors complained of, the plaintiff in error here restates the errors assigned, as follows:

1. That the facts, as found by the Court, are not sufficient in law to support the judgment.

2. That the facts, as found by the Court, are not sufficient in law to support the judgment for the recovery back of borrowed money.

3. That the facts, as found by the Court, are not sufficient in law to support the judgment for money borrowed in pursuance of the charter.

4 That the facts found by the Court are not sufficient in law to support the judgment for money had and received.

The learned counsel for defendant in error seem to ignore the real defences set up by the plaintiff in error, and to base their claim to recover back the money paid in open market for the bonds in question upon allegations in the petition that the bonds were ante-dated; that the plaintiff was deceived by the ante-date, and supposed the bonds were legal and valid obligations of the City of Louisiana. However much the plaintiff may have supposed he was deceived by the ante-date, *that* was not the fatal infirmity of the bonds in question. They were absolutely null and void for want of any authority to issue them, and each and every one of said bonds had the evidence of its invalidity written upon its face. That evidence is contained in the city charter and ordinance number 525, recited in said bonds as the authority under which they were issued.

The first four counts of the petition are for the recovery back of money obtained upon the bonds in question, which the petition avers were issued by the defendant for the purpose of borrowing money for its own use, and for no other purpose, which bonds were ante-dated, and were void for want of registration.

The fifth count is for money lent and advanced, laid out and expended by plaintiff for defendant, and money had and received by defendant to and for the use of the plaintiff.

The sixth count is for money found due and owing plaintiff on an accounting of defendant with plaintiff.

The general issue is pleaded to all these counts, and to warrant a recovery the substantial averments in the petition should be sustained by the facts found in the special verdict.

It is not disputed that the bonds were ante-dated and had never been registered. If there had been any authority to issue the bonds, the fact that they were ante-dated and had never been registered, would have been of small consideration. The contract having been made in pursuance of an ordinance of the city, and for a purpose authorized by the charter, would have been valid and binding without the issue of any bonds whatever.

The Court finds that after the 30th day of March, 1872, the defendant, City of Louisiana, which was then owing divers interest bearing debts amounting in the aggregate to over one hundred and fifty thousand dollars, and for the purpose of raising money to pay its said debts and the expenses of its government, executed the bonds in question; that the same were placed in the hands of a reputable stock and bond broker for sale; that the same were sold in open market at ninety cents on the dollar, the broker retaining five per cent commission for his services; that the proceeds, eighty-five per cent of their par value, were appropriated in payment and redemption of matured bonds and the rest paid into the city treasury; that although the said bonds were made and executed after the law of the 30th day of March, 1872, requiring the registration of bonds issued by Cities, Counties and Incorporated Towns, took effect, yet the defendant, for the purpose of evading the provisions of said registration law, and with the intent to make it falsely appear that said bonds were not subject to the requirements of said law, caused the said bonds to be ante-dated as of the 1st day of January, 1872, and caused it to be falsely stated therein that they were signed, *countersigned* and sealed on the day last named, and that the plaintiff and the said Dorsheimer and Gibbons, purchasers of said bonds,

and each of them, were *ignorant* of the fact that said bonds were made and issued subsequently to the taking effect of said registration law, and that they had been antedated, and that the recitals thereof were false, or of any fact that would invalidate them; but, on the contrary, they, and each of them, accepted said bonds by them respectively bought and paid and advanced their money therefor in good faith, believing said bonds to be what they, on their face, professed to be, obligatory on the defendant.

The foregoing contains in substance, all the facts found by the Court in support of the judgment.

The Court does not find that there was any contract for the borrowing of money *for any purpose*, or that the city ever authorized the bonds to be issued under any contract or agreement between the City of Louisiana and the defendant in error, or that there was any ordinance or other corporate act authorizing bonds to be issued to the defendant in error or to the said Dorsheimer or Gibbons, or either of them for borrowed money.

But suppose the Court had found the facts to be that under a contract made between the city and the defendant in error in pursuance of an ordinance duly passed for that purpose, the City of Louisiana had borrowed of the defendant in error $20,000 for the purpose of building a market-house or other legitimate purpose, had executed to the defendant in error twenty bonds, had ante-dated them and had failed to register the bonds, and that the defendant in error had innocently received said bonds, supposing them to be valid. Can there be any doubt that the defendant in error would not be entitled to judgment on the contract? Certainly not, for in such case the proceeding would be lawful and proper, whereas in the case at bar, there never was any contract or agreement of any kind between the city and the defendant in error to borrow money for the city for any purpose; but, on the contrary, an unlawful attempt on the part of the city offi-

cers to issue and negotiate the bonds without any corporate act of the city authorizing them to do so.

The facts, as found by the Court, are not sufficient in law to support a judgment upon any of the counts set forth in the petition. The facts as found fail to show any contract between the city and the defendant in error for borrowing money, or that he had any dealings with the city and this is admitted by the counsel for the defendant in error, who, in their brief, page 35, say:

"He was not dealing directly with the city, but with brokers, whose principal was unknown to him."

He did not know that he was dealing with the city and bought, as other bond speculators purchase, at a heavy discount, and took the risk as to the validity or invalidity of the bonds. Dealing, as he did, with a stock and bond broker, there can be no implication of a liability on the part of the city and a promise to repay the purchase money if the bonds should prove invalid. The plea that he "was a stranger," and the city officers "took him in," stated as follows in brief of defendant in error, page 20, "is not pertinent and can be of no avail." It states that "the judgment shows that the defendant, a non-resident of Missouri, and as such presumably unacquainted with the laws of that State, in August, 1872, purchased in the stock market at St. Louis, of certain stock brokers there, some $21,000 of negotiable (?) bonds of the plaintiff, bearing date, January 1, 1872, and due in 1887, paying at the rate of ninety cents on the dollar; that at the time he so bought he was ignorant of the fact that they had not been previously issued or that they had been issued subsequently to the taking effect of said act of March 20, 1872, or that they had been ante-dated, or that their recitals were false, or any other fact that would invalidate them, but believed them to be what on their face they professed to be, and to be valid."

"Every purchaser of a municipal bond is chargeable with

notice of the statute under which the bond was issued. If the statute gives no power to make the bond the municipality is not bound."

United States v. Macon Co., 99 U. S., 582.

Even if he had been dealing with the officers of the city directly, his ignorance would be of no avail.

"But in each case the person dealing with the agent, knowing that he acts only by virtue of a delegated power, must, at his peril, see that the paper on which he relies comes within the law under which the agent acts, and this applies to every person *who takes the paper afterwards;* for it is to be kept in mind that the protection which commercial usage throws around negotiable paper cannot be used to establish the authority under which it was originally issued. These principles are well established in regard to the transactions of individuals. They are equally applicable to those of the government. When negotiable paper is found in the market purporting to bind the government, it must necessarily be by the signature of an officer of the government, and the purchaser of such paper, whether the first holder or another, must, at his peril, see that the officer had authority to bind the government."

The Floyd Acceptances, 8 Wall., 666.

It is a well known principle of the law that a municipal corporation cannot, without special authority of its charter, sell and dispose of its bonds at less than their par value. It has no power to contract a debt for a specific amount, and issue in payment thereof a warrant or obligation for a larger amount. Every dealer in municipal bonds knows this, and the purchasers in this case were by the recitals in the bonds referred to the charter as authority for their issue.

In McCluer vs. Township of Oxford, 94 U. S. 429, the Court says:

"To be a *bona fide* holder, one must be a purchaser for

value without notice, or the successor of one who was. Every man is chargeable with notice of that which the law requires him to know, and of that which after being put upon inquiry he might have ascertained by reasonable diligence. Every dealer in municipal bonds, which, upon their face, refer to the statute under which they were issued is bound to take notice of the statute and of *all its requirements*.

In the case of the Township of East Oakland vs. Skinner, 94, U. S., 255, Mr. Justice Hunt, in rendering the opinion, says:

"We have held that there can be no *bona fide* holding where the statute did not, in law, authorize the issue of the bonds. The objection in such case goes to the point of power. There is an entire want of jurisdiction over the subject. It is not the case of an informality, an irregularity, fraud or excess of authority in an unauthorized agent. Where there is a total want of authority to issue the bonds *there can be no such thing as a bona fide holding*."

The purchasers of the bonds in question, however ignorant they may have been of ante-dating and want of registration of said bonds, cannot be said to be innocent holders. The bonds, as before stated, recite that they were issued in pursuance of the City Charter and of City Ordinance No. 525. This ordinance was passed on the 8th day of January, 1867, and assumed to authorize the Mayor and City Treasurer to issue bonds of the city, bearing ten per cent interest from date, payable semi-annually, and the Fund Commissioner to sell them at ten per cent discount, and to apply the proceeds to the purchase of outstanding city bonds and warrants.

Ordinance No. 612, passed March 18, 1871, in like manner, attempted to authorize the Fund Commissioner to sell said bonds at fifteen per cent discount.

There was no authority in the City Charter nor in the General Statutes of the State to fund the indebtedness of

the city in any manner, and to issue bonds contemplated by said ordinances. The city, by these ordinances, attempted to delegate to and confer upon itself power and authority to issue and sell its bonds at a ruinous discount, a proceeding not authorized in any manner by its Charter or general laws of the State.

In Chisholm vs. City of Montgomery, 2 Woods, 584-595, Mr. Justice Bradley said:

"The plea that the city is estopped by the act of its officers, by the resolution of its City Council, or by the negotiable form or other matter in the bonds themselves, from denying the authority of such officers to pledge the faith of the city in aid of said plank roads, and to issue the bonds in question, cannot be maintained. *Public officers cannot acquire authority by declaring that they have it.* They cannot thus shut the mouth of the public whom they represent. The officers and agents of private corporations, entrusted by them with the management of their own business and property, may estop their principals and subject them to the consequences of their unauthorized acts. But the body politic cannot thus be silenced by the acts or declarations of their agents. If it could be, unbounded scope would be given to peculations and frauds of public officers. I hold it to be a sound proposition that no municipal or political body can be estopped by the acts or declarations of its officers from denying their authority to bind it. The Floyd Acceptances, 8 Wall, 666. Finally, the plea that the plaintiffs are *bona fide* holders of the bonds cannot avail where the defence is want of power to issue them. Of this defect, the plaintiff's were bound to take notice. Had the power to issue the bonds existed and had the question been whether certain preliminary conditions had been complied with, the plea, might, under certain circumstances, have been a good one."

There is no authority whatever, express or implied, in the City Charter authorizing the city to issue and sell its bonds

for the purpose of funding its outstanding indebtedness. Ordinance No. 525 (Printed record, page 13), recited in the bonds as authority, is entitled, "An ordinance in relation to the public debt of the city, the issuing of bonds and to provide for the funding, consolidation and settlement of all outstanding debts of the city," and the Court finds that said ordinance was duly passed and duly approved on the 8th day of January, 1867. But the Court does not find that the ordinance was a valid and binding ordinance in full force at the date of the sales of the bonds in question, and authorized the sale of the same at a discount. The Court also finds that ordinance No. 612 (printed record, page 15-16), was also duly passed and approved, but makes no finding as to the effect or validity of the same. The finding of the Court, therefore, is that the ordinances in question were passed and approved in accordance with the forms of the law.

These ordinances were void from the beginning for want of authority in the Charter to pass them, but if they ever had any validity as funding ordinances, they were repealed by the Registration Act of March 30, 1872, the eleventh section of which provided another and different method for funding municipal indebtedness, and is set out on page 4 of the original brief of plaintiff in error. The fourteenth section of said Registration act repealed all acts and parts of acts in conflict therewith, and said act took effect from and after its passage.

Notwithstanding this repeal and the substitution of the new method provided for in said act for funding the outstanding indebtedness of the city, Mr. William Parker, who was then Mayor of said city, and N. H. Griffith, who was then Clerk of the City Council, signed, among other bonds, the bonds mentioned in the petition. These bonds bore the printed date of January 1, 1872, but were signed by said officers in June or July, 1873; one of which bonds

—the others differing only in their numbers—is set out in printed record, on page 16.

The learned Counsel for the defendant in error assert that "there is no foundation in the claim that these ordinances, No. 525 and 612, were repealed by the enactment of section 11 of the act of March 30, 1872."

This act was a general law and intended to put a check upon the epidemic for increasing municipal indebtedness then raging in Missouri, and to limit the issue of municipal securities—and by its very terms to repeal all laws in conflict therewith, State and municipal. More than this, said ordinances had no validity after the said registration act took effect, as being in conflict with said Charter provisions in regard to all city ordinances, requiring that they "should not be repugnant to the Constitution and general laws of the State."

No attempt was made by the city officers to comply with the terms of said ordinance, if it ever had any validity. By its terms, before any step could be taken in regard to the issuing of any bonds under said ordinance the joint and concurrent action of the Mayor and Treasurer was necessary in order to fix the sums in which the bonds should be issued, and the length of time they should run, etc. No finding of such concurrent action was had and none could be had, for the reason that the Treasurer never acted in the issuing of said bonds. The second section requires that the bonds shall be signed by the Mayor, attested by the clerk of the City Council, and *countersigned by the Treasurer*, and the 8th section of said ordinance provides for the delivery of the bonds by the *Mayor and Treasurer* in certain amounts to the Fund Commissioner upon his requisition. There is nothing in the evidence or in the finding of the Court to show that the Mayor and Treasurer ever acted in respect of the duties jointly required of them, or that the Treasurer ever acted at all; on the contrary, the bond set out in the record shows that he never joined in executing or

delivering the bonds, and his *countersignature* was a prerequisite to their issue. Here was a fatal defect as to the execution of the bonds. The ordinance required the signature of the Treasurer, and the absence of his signature shows conclusively that he never consented to the execution of the bonds in question.

The learned counsel for defendent in error in their brief, page 31, remark:

"That the transaction, considered as one *ultra vires* of the corporation was not criminal or immoral, or even illegal in any such sense of turpitude, or to make the rule which denies to voluntary participants in a criminal or immoral transaction the right to recover money paid in the course thereof, apply. No penalty is imposed by the Charter upon the city or its officers for borrowing money at eleven per cent interest, much less is any imposed on the person lending to it at that rate".

"The transaction was neither criminal, illegal, or immoral" say the learned counsel. Let us examine this. The amount realized on the twenty-one bonds of one thousand dollars each was seventeen thousand eight hundred and fifty dollars after deducting discount and five per cent commission for brokerage. The bonds had fourteen years to run at ten per cent interest from date, payable semi-annually. At maturity the bonds, with interest, would amount to $50,-400, nearly treble the amount realized, and this, according to the theory of the defendant in error, was an eminently proper and correct transaction—although without any warrant therefor in the Charter.

The Charter expressly prohibited the borrowing of money at a rate exceeding ten per cent. Sec. 22, Art. 7. It was, therefore, illegal, if the bonds were given for borrowed money, which they were not.

Section 16, article 4, of the City Charter, declares, that any City Marshal, City Treasurer, or other person having custody and control ot the city funds, who shall violate any

of the provisions of said Charter, shall be found guilty of a misdemeanor, and fined from ten to one hundred dollars for each offense.

The violated Charter was referred to on the face of every bond purchased by the defendant in error, and yet he was perfectly innocent of any wrong whatever in the transaction.

Section 1488, Revised Statutes of Missouri, provides that every officer or person who shall be convicted of any wilful misconduct or misdemeanor in office, where no punishment is prescribed, shall be fined or imprisoned, or both

The buying and selling of the bonds in the manner stated was a violation of law, in which the defendant in error participated, and for which the city officials were subject to a penalty under the Charter. The transaction was a great wrong, and imposed a grievous burden upon the taxpayers, and whether criminal or not on the part of the defendant in error so as to make him amenable to the law, it could not have been completed without his assistance.

To this extent he violated the law recited upon the face of the bonds he purchased. The violation of law is illegal, and nothing but the refinement of casuistry could determine that it was not immoral.

The learned counsel for defendant in error make the following citation from the opinion of Mr. Justice Field, in the case of Marsh vs. Fulton County, 10 Wall, 584, to-wit:

"We do not mean to intimate that liabilities may not be incurred by Charters independent of the Statute; undoubtedly, they may be. The obligation to do justice rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law, independent of any Statute, will compel restoration or compensation."

But the learned counsel stop short at this point in the opinion, and fail to cite what immediately follows, to-wit:

"But this is a very different thing from enforcing an obligation attempted to be created in one way when the Statute declares that it shall only be created in another and different way."

And the case at bar stands precisely on the same footing as the case of Marsh vs. Fulton County.

There is, as there was in that case, a total want of authority on the part of the city officers to issue and sell the bonds in question, which, to adopt the language of that decision, "might with equal authority have been issued by any other citizens of that municipality."

That portion of the opinion which immediately precedes the above citation, and treats upon the want of authority to contract, and the consequent inability to ratify, is so exhaustive and conclusive upon those questions, that we here insert the same at length, as decisive authority upon the all important questions involved in this case, to-wit:

"But it is earnestly contended that the plaintiff was an innocent purchaser of the bonds without notice of their invalidity. If such were the fact we do not perceive how it could affect the liability of the County of Fulton. This is not a case where the party executing the instruments possessed a general capacity to contract, and when it might for such reason be taken without special inquiry into their validity. It is a case where the power to contract never existed—where the instrument might, with equal authority, have been issued by any other citizen of the county. It is a case, too, where the holder was bound to look to the action of the officers of the county, and ascertain whether the law had been so far followed by them as to justify the issue of the bonds. The authority to contract must exist before any protection as an innocent purchaser can be claimed by the holder. This is the law, even as respects commercial paper, alleged to have been issued under a delegated authority, and is stated in the case of *Floyd Acceptances*."

"In speaking of notes and bills issued or accepted by an

agent acting under a general or special power, the Court says":

"In each case the person dealing with the agent, knowing that he acts only by virtue of a delegated power, must, at his peril, see that the paper on which he relies comes within the power under which the agent acts. And this applies to every person who takes the paper afterwards; for it is to be kept in mind that the protection which commercial usage throws around negotiable paper cannot be used to establish the authority by which it was originally issued."

"It is also contended that the bonds in suit were issued without authority, their issue was subsequently ratified, and various acts of the supervisors of the county are cited in support of the supposed ratification. These acts fall very far short of showing any attempted ratification, even by the supervisors. But the answer to them all is that the power of ratification did not lie with the supervisors. A ratification is, in its effect, upon the act of an agent, equivalent to the possession by him of a previous authority It operates upon the act ratified in the same manner as though the authority of the agent to do the act existed originally."

"It follows that the ratification can only be made when the party ratifying possessed the power to perform the act ratified."

"The supervisors possessed no authority to make the subscription or issue the bonds in the first instance, without the previous sanction of the qualified voters of the county. The supervisors in that particular were the mere agents of the county. They could not, therefore, ratify a subscription without a vote of the county, because they could not make a subscription in the first instance without such authorization. It would be absurd to say that they could, without such vote, by simple expressions of approval or in some other indirect way, give validity to acts when they were directly in terms prohibited by statute from doing

those acts until after such vote was had. That would be equivalent to saying that an agent not having the power to do a particular act for his principal could give validity to such act by its indirect recognition."

In conclusion, we submit that the finding of the Court, viewed in the light of the authorities above cited, is not sufficient in law to uphold the judgment.

D. P. DYER,

Attorney for Plaintiff in Error.

OFFICE SUPREME COURT U. S.
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—IN THE—

Supreme Court of the United States,

OCTOBER TERM, 1880.

THE CITY OF LOUISIANA,
Plaintiff in Error,
vs.
THOMAS J. WOOD,
Defendant in Error.

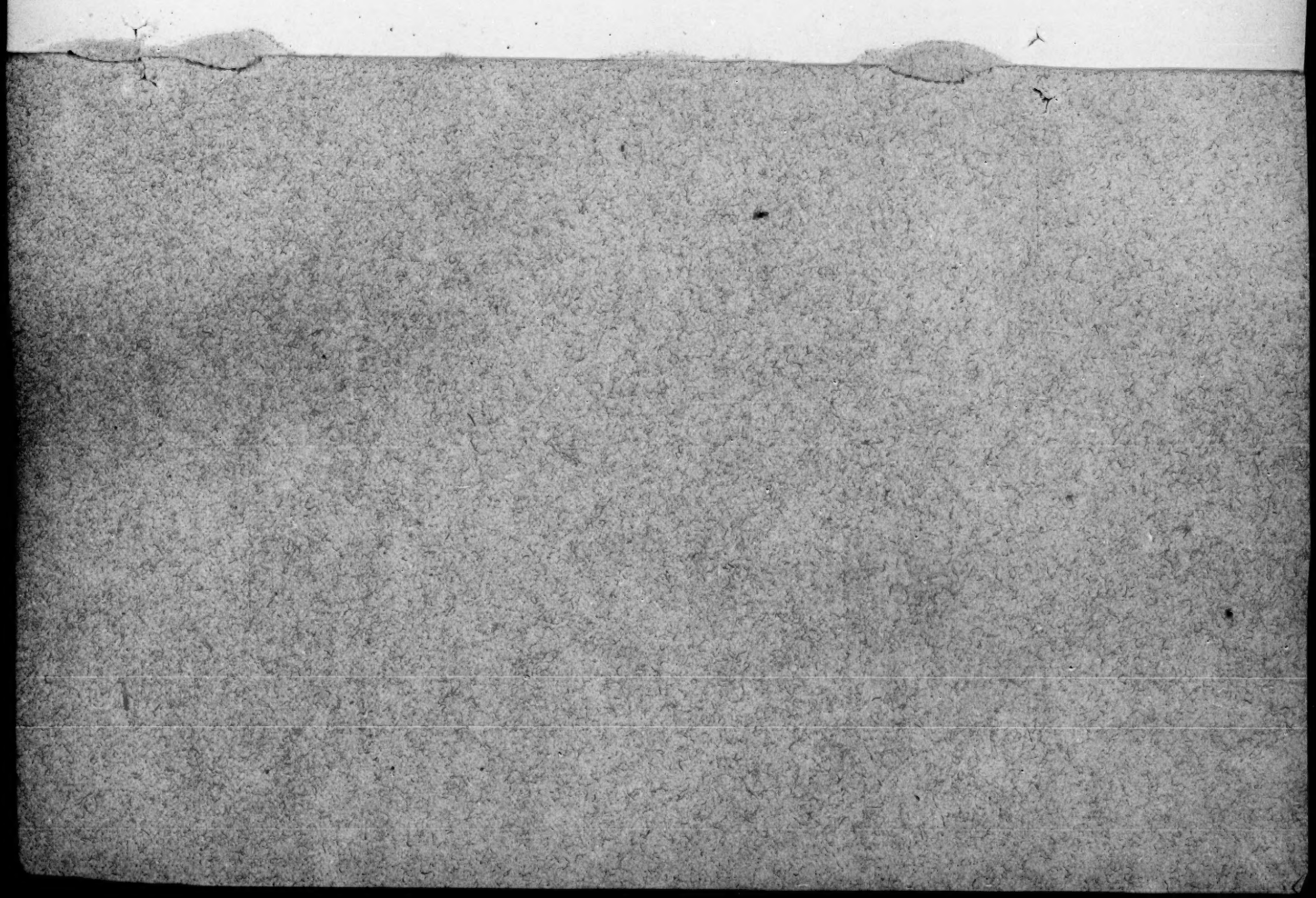
No. 515.

Error to the Circuit Court of the United States, for the Eastern District of Missouri.

STATEMENT AND BRIEF.

DRYDEN & DRYDEN,
Counsel for Defendant in Error.

Pierce Bros., Law Printers, 217 North Third St., St. Louis.



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Error to the Circuit Court of the United States, for the Eastern District of Missouri.

STATEMENT OF THE CASE

BY DRYDEN & DRYDEN, FOR DEFENDANT IN ERROR.

This was an action for money had and received, brought in the circuit court by the (now) defendant Wood, a citizen of Ohio, against the (now) plaintiff City of Louisiana, a municipal corporation and citizen of Missouri. The subject of the action was money paid to the city for certain bonds of the city's own make, negotiable in form, sold by the city without having them registered in the State Auditor's office as required by statute.

Four several sales of bonds with the receipt of the money therefor are involved in the suit: two of the sales

were made immediately to Wood, the defendant, and the other two to persons of whom Wood became transferee.

The petition in the case contains six counts, the last two being the money counts in the common law form, and the first four being framed in conformity with the Missouri code; each one of the four being based on one of the four several sales of bonds above named, and containing each a statement of the substantive facts relied upon to establish the right to recover. [Printed Record, p. 2 to 10, inclusive.)

The *first* count alleges the payment of $9,127 by Wood to the city, on the twenty-fifth of August, 1873, and the delivery therefor by the city to him of ten bonds of $1,000 each (all the bonds involved in the case were of that denomination); the *second* count alleges the payment of $8,215 by Wood on the first of September, 1873, and the delivery to him therefor of nine bonds by the city; the *third* count alleges the payment of $950 by Louis Dorsheimer on the twenty fourth of June, 1873, and the delivery to Dorsheimer therefor of one bond, and the sale and delivery of that bond by Dorsheimer on the fifth of April, 1875, for value, to Messrs. Keleher & Co., and their sale and delivery of the same on the same day for value to Wood; and the *fourth* count alleges the payment of $916.66 by John F. Gibbons to the city on the twenty-fourth of February, 1874, and the delivery to Gibbons therefor of one bond, and the sale and delivery of that bond by him to Keleher & Co. on the fifth of April, 1875, for value, and their sale and delivery of the same on the same day for value to Wood, the defendant in error.

It is also alleged in all of the (four) counts, that the bonds were in form negotiable, payable to bearer in January, 1887, in New York, with semi-annual interest

coupons attached; that the city caused them to be executed as a means of borrowing money for its uses; that although they bear date as of January 1, 1872 (anterior to the registration law), they were, in fact, made and executed in July, 1872, after the registration law went in force, and were so antedated and made to contain false recitals as to the time of their execution, purposely, and with the design of evading and avoiding the requirements of the act of Assembly of the thirtieth of March, 1872, providing for registration with the State Auditor; that the city negotiated and sold the bonds to the said several purchasers without having them registered as required by the statute, and that because of their non-registration, they were as bonds inoperative and void; that at the times when said purchasers paid and advanced their money and received their bonds they were ignorant of the fraudulent practices and designs of the city, and paid and advanced their money in good faith, supposing the bonds were made and executed at the time they purported to have been made, and were the valid obligations of the city; that the city paid the several instalments of interest on said bonds falling due in January and July of the years 1874 and 1875, and forty per centum of the half-yearly instalment of January, 1876, when the same became due; but that when the July interest in 1876 became due, and was demanded, the city refused payment of the same, on the score that the bonds were void, because not registered; and for that cause "then and there wholly repudiated said bonds, and denied their obligation and binding force upon it, and declared it to be its purpose for the cause aforesaid to make no other or further payment of interest or principal on said bonds," and ever afterwards refused to pay and persisted in its avowal of its purpose not to pay, and in its denial of the obligation of said bonds for the cause aforesaid; that afterwards, and before the institution of the suit, the defendant Wood tendered and offered to return said

bonds to the city, and demanded of it the return to him of the money paid and advanced to it therefor, and the refusal of the tender and demand; and each count concluded with an offer to produce the bonds in court for cancellation, and a demand for judgment for the several amounts paid and advanced to the city, with interest at six per cent. per annum—in short, the petition shows that the city, as a means of borrowing money, caused the bonds in question to be executed while the registration law was in force, and for the purpose of evading the statutory requirement to register, caused the bonds to be antedated to a day anterior to the registration law, and then by means of these antedated, unregistered, and hence void bonds, procured from Wood and Dorsheimer, and Gibbons the sums of money specified in the petition as having been by them paid and advanced to the city, and now, not only repudiates the bonds, but refuses to repay the money.

The city demurred to the third and fourth counts, and answered the first, second, fifth and sixth, traversing the allegations thereof, and also setting up that the city's fund commissioner sold the bonds in excess of his authority. [Pr. Rec., pp. 10, 11.] Wood replied, traversing the city's special defence, and pleading the city's ratification of the supposed exercise of excessive authority, and the passage of a new ordinance conformably with which the fund commissioner acted in disposing of said bonds. [Pr. Rec., 11, 12.] The court overruled the demurrer to the third and fourth counts, and thereupon, by consent, the city's answer to the first, second, fifth and sixth counts, was taken and treated as its answer to all the counts. [Pr. Rec., p. 13.]

A jury was waived by a stipulation in writing filed with the clerk under Section 649 of the Revised Statutes [See same in appendix to record and to plaintiff's brief],

and the issues of fact were tried by the court, without the intervention of a jury. The finding of the court was special [Pr. Rec., pp. 13 to 19], and upon it the court rendered judgment for twenty-two thousand, two hundred and twenty-six dollars and forty cents, the damages assessed in favor of Wood, the plaintiff below. [Pr. R. p. 19.]

It is established by the special finding that the ordinance No. 525 (approved January 8, 1867), which is set out in *haec verba*, was duly passed by the proper corporate authorities [Record p. 13]; that the city caused the twenty-one bonds, described in the first four counts of the petition, to be executed (one of which, as descriptive of all, is set forth in the finding in *haec verba*) [Record p. 16]; that the city was owing debts aggregating a large sum, and that these bonds were executed [Record p. 16] "for the purpose of raising money to pay the said debts and the expenses of its government." The ordinance thus set out, and found to have been passed, provides [Sec. 1, Record p. 13] for the issue of city bonds, and [Sec. 5] creates the office of "Fund Commissioner," and [Sec. 8] directs the delivery of the bonds to the fund commissioner, and [Sec. 9] makes it his duty "to make sales of the bonds." The bonds thus set out and found to have been made by the city, recite on their face [Record p. 16] that they were issued under authority of said ordinance No. 525, and a specified act of assembly,—the same act found in appendix "B" hereto. It is also found [Rec. 15] that a fund commissioner was duly appointed by the city under said ordinance; that he accepted the appointment and performed the functions of the office; that [Record p. 17] the city, in the further execution of its purpose to raise money to pay its debts and expenses, placed the bonds mentioned in the petition, in the hands of said fund commissioner for sale, who thereafter sold them,—nineteen of them to the defendant Wood, and one each

to Dorsheimer and Gibbons, and received therefor in the aggregate $18,900, and with the express assent and approval of the city council [Record p. 18] employed the same (first deducting expenses of sale) in payment of the city's debts and expenses.

It is also found [Record, p. 17] that said bonds were made after the registration law of March 30, 1872, went into force, and that they were antedated by the plaintiff in error, "for the purpose of evading the provisions of "said registration law, and with intent to make it falsely "appear, that said bonds were not subject to the require- "ments of said law, and that the bonds were therefore "void;" and that Wood, Dorsheimer and Gibbons each paid his money to the city in good faith, in ignorance of the facts invalidating the bonds; that [Record 17] Dorsheimer and Gibbons each, for value, transferred and delivered his bond to Keleher & Co., and they, for value, transferred and delivered the two to Wood; that the city paid the interest on the bonds, as alleged in the petition, but [Record, p. 18] when the July interest, 1876, became due, it refused to pay same, and wholly repudiated the bonds, and denied its obligation to pay, on the score that the bonds were void because not registered; and it is also found that before suit brought, Wood offered to return and deliver up the bonds to the city, and demanded re-payment of the money paid therefor, which the city refused; and the finding further declares that by reason of the facts thus found, the plaintiff below, Gen. Wood, had sustained damage, which the court assessed at $22,226.40.

The Record does not disclose any question raised, nor any exception saved in the progress of the trial.

The city has brought the case here by writ of error.

NOTE.—In the several appendixes "A," "B" and "C," printed at the end of the following brief will be found copies of such provisions of the statutory law of Missouri, as bear upon the questions involved in the case.

BRIEF AND ARGUMENT.

I.

Under the provisions of the Twenty-first Rule of this Court, the Judgment of the Court below should be affirmed, for want of a proper assignment of errors by the Plaintiff.

Pursuant to the terms of the stipulation, under which this cause is submitted to the court, we have been furnished by plaintiff's counsel with a copy of the brief filed on its behalf. An examination of it discloses the fact that while, in attempted compliance with the rule, it contains a statement of errors relied upon for the reversal of the judgment [Plaintiff's brief, pp. 4 and 5], yet no one of the several matters, so stated there as "errors assigned," is in fact a matter assignable for error, or of which this court can take any cognizance.

The cause, as already shown in the statement, was tried without a jury, and, neither the evidence, nor any of the proceedings at or before the trial after the issue joined, having been preserved by bill of exception, the only subject of review by this court, is the sufficiency of the facts found by the special finding to support the judgment.

U. S. Rev. Stats. §§ 700 and 649;
Dirst v. Morris, 14 Wall., 484.

None of the assignments make any question as to this; but, on the contrary, are directed only to matters and questions, anterior to the special finding, and concluded by it. They, therefore, are wholly immaterial and cannot be reviewed here. And, there being no proper assignment for error of any matter appearing on the

record, the judgment of the lower court, we take it, will be affirmed, the same as if no attempt whatever at an assignment had been made.

That the matters assigned are in fact not assignable upon the present record, we will proceed to show.

The *first* "error assigned,"—there being four [plaintiff's brief, pp. 4 and 5],—complains, that "the circuit court erred in finding for the plaintiff below."

Here it is *the court*,—not the *facts found*,—that is arraigned. The allegation is but another form of charging, that in the trial of the cause the court by some misjudgment, or misapprehension of the law, or of the facts as shown by the evidence, reached a wrong conclusion, finding for the plaintiff when it ought to have found for the defendant. The sufficiency of the facts, as found, is not at all drawn in question, but only the correctness of the finding. The allegation makes no suggestion, or pretense, that if the facts exist as found, judgment must not follow for the defendant in error. There is no remedy in this case for any error, if any, committed in the trial, because no exception was saved, and the allegation therefore, that "the court erred in finding for the plaintiff below," is wholly ineffective.

The *second* assignment alleges:

"The court erred in holding that the facts found showed a contract, either express or implied, between the plaintiff and defendant for the borrowing of money."

Waiving the question, whether the court held any such thing as is imputed to it, the error complained of was an error committed in the progress of the trial, and, not having been excepted to there, is not assignable for error here;—furthermore, the error alleged is an error of law, and, if its existence were confessed, it is in nowise inconsistent with the sufficiency of the facts found to support the judgment. It is rare that blunders of law, or of fact, are not committed in reaching a verdict,

but the eyes of the appellate court are closed to all such, if not in due time excepted to. In the absence of exception the only inquiry for the court is: "Are the facts established by the verdict or finding sufficient in law to uphold the judgment?"

The *third* assignment alleges:

"The court erred in holding that the city of Louisiana, under the charter, had the legal right to borrow money on the terms, or in the manner, stated in the pleadings and *shown by the proofs.*"

This assignment likewise seeks to raise an immaterial issue, and is subject to the same criticism as the second.

The *fourth* assignment is as follows:

"The furnishing of money by the plaintiff to the agents of the defendant *under the circumstances* and on the terms *shown by the evidence* was in violation of the charter of the city of Louisiana and cannot be recovered back as for money had and received to the use of the defendant."

This assignment is surely presented in forgetfulness of the stage that has been reached in the case. It is based upon *the evidence*, or upon what is "shown by the evidence."

The evidence appealed to is not accessible to us. It was not put into the record, nor was it necessary it should have been. We have got to a point in the case past the evidence, and past the consideration of questions concerning the evidence. We are now dealing with facts found by the special verdict, and are concerned with nothing else. No objection here, not going to their sufficiency to uphold the judgment, is pertinent, or can be of avail. The assignment under consideration does not even allude to the special finding.

We therefore respectfully submit, that these allegations present no question that can legitimately arise upon this record, and that the court ought therefore, in accordance with its own rules, to affirm the judgment of the circuit court without further consideration.

Should the court, however, deem it to be its duty to look into the case beyond the scope of the errors assigned, we then submit that:

II.

The facts found do support the judgment.

They show the receipt and use by plaintiff of defendant's money, paid to it without a consideration, in ignorance of facts, and by reason of its deceit; also paid upon a contract invalid, and incomplete, because of plaintiff's non-compliance with the requirements of the law regulating the form of such contracts, and which, for want of such formality, it repudiated. Money received under such circumstances cannot in conscience be retained, and the law implies a liability, and a promise, to repay it.

That money paid by one to a natural person or private corporation, upon a mistake of fact, or in ignorance of fact, or without a consideration, or, generally speaking, under any other circumstances which render it unjust, that the person or corporation receiving should retain it, may be recovered back upon an implied assumpsit, is a proposition so well settled in the law as hardly to need the citation of authority. The application of it is illustrated in the books by a great variety of cases. Of them the class which, in principle, seems to

us to most nearly resemble the case at bar, is that of those where money was paid upon contracts, invalid and incomplete, for want of conformity to the provisions of the Statute of Frauds,—as, for instance, cases of contracts for the purchase of land not evidenced by writing, or of parol contracts not to be performed within one year, and the like. In all such cases it is uniformly held, that the contract upon which the money was paid being a nullity, the person receiving it has given no consideration for it, and if he repudiates the contract must repay the money. Of this class the following will suffice for examples.

Thompson v. Gould, 20 Pick., 134;
Reynolds v. Harris, 9 Cal., 338;
Swift v. Swift, 46 *Id*, 266;
Cook v. Doggett, 2 Allen (Mass.), 439;
Hunt v. Sanders, 1 A. K. Marsh, 552;
Allen v. Booker, 2 Stew., 21;
Brandeis v. Neustadt, 13 Wis., 142, 154;
Scott v. Bush, 29 Mich., 523;
Rice v. Peet, 15 Johns, 502.

Thus, in the case last cited, the facts and decision were as follows: plaintiff and defendant by parol contract agreed to exchange farms. Plaintiff, as security that he would perform the contract on his part, delivered to the defendant a promissory note for $500, which he held against one Franklin. Franklin paid the money to the defendant, and thereupon the plaintiff sued the defendant for money had and received. The defendant pleaded that it was agreed that plaintiff was to forfeit the note in case he failed to perform the agreement to exchange. The pledge was proved on the trial, as was also its terms, yet there was a verdict for the plaintiff and judgment accordingly.

Per Curiam: "The judgment must be affirmed

* * * But there is another ground on which plaintiff had good right to recover the money received by the defendant on the note. It was received by the defendant without *consideration;* the contract for the exchange of farms was void by the Statute of Frauds, being by parol only."

And in the case of Swift v. Swift, *supra,* the Supreme Court of California held, that where money was lent on a parol contract, by which re-payment was not to be made within a year, and so the contract was contrary to the Statute of Frauds and void; yet, as the borrower had the lender's money without consideration, the law would imply a promise to repay it on demand.

So again, in another class of cases, where the infirmity in the contract, upon which the money was paid, was the want of power in one of the parties to make such a contract, it has been held, of both natural persons and private corporations, that they are liable to repay the money thus received upon the imperfect agreement.

Shearer v. Fowler, 7 Mass., 31;
N. W. Union Packet Co. v. Shaw, 37 Wis., 655;
Tracy v. Talmage, 14 N. Y., 162, 216;
Curtis v. Levitt, 15 *Id.*, 1, 95, 275.

Thus, in Shearer v. Fowler, *supra,* where money was paid by Shearer as the consideration for a deed made by Fowler's wife, as his attorney, and invalid for want of power in her to execute it, the Supreme Court of Massachusetts, in 1810, held that the money could be recovered by Shearer, saying that *the principles of law* applicable to the case *were well settled;* and further, as follows [p. 31]

"Whenever money is paid in consideration of a contract void for want of power in one of the parties, or for any cause other than fraud or illegality in the contract, natural justice dictates that the money so paid shall be refunded, and there is no principle of law to prevent the operation of so equitable a rule."

And, again, in the case of the Northwestern Union Packet Co. v Shaw, *supra*, which arose in Wisconsin, and where the plaintiff, a steamboat corporation, agreed to buy wheat of the defendant, and had paid $1,000 on account of the bargain in advance, but the contract being one *ultra vires* of the corporation could not be carried out by it, and it therefore sued to recover back the $1,000 so advanced, it was held that the plaintiff could recover. Touching the right of plaintiff to have back its money under such circumstances, the Supreme Court of Wisconsin (Lyon, J.,) said [37 Wis., p. 661]:—

"An extended discussion of the question will not be profitable. There are many adjudications in this country and in England bearing upon it, some of which are cited in the brief of counsel for the plaintiff. The cases have been carefully examined, and we think the rule may fairly be deduced from them, that when money has been paid upon an executory agreement, which is free from moral turpitude, and is not prohibited by positive law, but which is invalid by reason of the legal incapacity of a party thereto, otherwise capable of contracting, to enter into that particular agreement, or for want of compliance with some formal requirement of the law (as that the contract shall be in writing, and the like), the money so paid may, while the agreement remains executory, be recovered back by the party paying it in an action for money had and received.

"Many of the cases go further and sustain the action when some of the foregoing conditions are wanting. But the exigencies of this case do not require us to determine how far the rule may be extended, or what conditions may be omitted therefrom without defeating the action. The rule is here stated most favorably for the defendant; and yet it is clear that under it the plaintiff may maintain an action to recover the money paid on the invalid agreement. A contract to buy wheat is an innocent one,—no statute has prohibited it—and the

particular agreement is invalid only because of the accident, that the purchaser is a corporation instead of a natural person, and happens to lack authority to make this particular contract."

And that the rule thus established as to the contracts and liabilities of natural persons and private corporations applies also to those of municipal corporations; that the latter also are liable upon an implied assumpsit for money received and retained or used by them, which, *ex æquo et bono*, they ought to refund, is well settled by the opinions of text writers and jurists, and by many adjudicated cases. See—

Dill. on Mun. Corp., 2d Ed., §§ 88 (note 2), 383, 384 and 750;
Dill v. Wareham, 7 Metc., 438 and 447;
Paul v. Kenosha, 22 Wis., 266;
Nelson v. Mayor of N. Y., 63 N. Y., 535;
Mayer v. same, *Id.*, 455;
McDonald v. Mayor of N. Y., 68 N. Y., 29;
Gas Co. v. San Francisco, 9 Cal., 468-470;
Argenti v. same, 16 *Id.*, 255;
McCracken v. same, *Id.*, 631;
Piemental v. same, 21 Cal., 351;
Township v. Township, 11 Iowa, 506;
Marsh v. Fulton Co., 10 Wall., 684;
Mayor v. Ray, 19 Wall., 483 and 484. [Opinion of Hunt, J.]
Gause v. Clarksville, 7 Reporter, 519 (Dillon, J.) S. C., 8 Cent. L. J., 364, top;
Anthony v. Jasper Co., No. 128, Oct. T., 1879, U. S. Sup. Ct.

In a case decided by the Supreme Court of Massa-

chusetts in 1843, the question arose upon facts as follows: The defendant, the town of Wareham, granted to the plaintiffs (Dill and others) the right to take oysters in certain waters of the town for a period of five years; the plaintiff to pay the town a stipulated price per bushel for them, and to make a deposit with the treasurer of the town of $500 a year, as security for the payment of the contract price. Plaintiffs made the required deposit, and after taking oysters under the contract for a time the town, as was alleged, interfered with the plaintiffs' enjoyment of the rights and privileges granted, and thereupon the plaintiff brought suit on the contract for damages, and for money had and received. Shaw, C. J., delivering the opinion of the court, said:—

"The supposed contract * * * upon which this action is brought, was one which the town of Wareham *had no authority* as a corporation to make, and the town is not bound by it.

"In regard to the sum of five hundred dollars, as it appears that *it was received by the treasurer and went to the use of the town, and was so received in advance, upon a consideration which has failed*, it must be regarded as money had and received by the town to the plaintiffs' use, and therefore the action for that sum will lie."

Dill and others v. the Town of Wareham, 7 Met. (Mass.), 447.

Also, in the case of the Gas Company v. San Francisco, *supra*, the question of liability of municipal corporations upon implied contracts generally, was discussed at great length by the Supreme Court of California, and the numerous cases theretofore decided bearing upon it reviewed. The court held in favor of the liability upon the facts of that case.

And in the subsequent cases, in the same court, of Argenti v. San Francisco, McCracken v. same, and Pie-

mental v. same, the question of the liability of the city of San Francisco to repay to the several plaintiffs therein certain sums paid by them into the hands of the treasurer and other agents of the city, for the purchase price of land sold to them, under the assumed authority of an ordinance, which was never properly passed, and hence was invalid, and which sums were expended for the legitimate uses of the city, arose and was very fully argued and considered. In the case of Argenti the views of the court upon the question were expressed in an opinion delivered by Field, C. J., in the following language [16 Cal., 282]:—

"The doctrine of implied municipal liability applies to cases where money or other property of a party is received under such circumstances that the general law, independent of express contract, imposes the obligation upon the city to do justice with respect to the same. If the city obtain money of another by mistake, or without authority of law, it is her duty to refund it—not from any contract entered into by her on the subject, but from the general obligation to do justice, which binds all persons, whether natural or artificial. If the city obtain money or other property which does not belong to her, it is her duty to restore it, or, if used by her, to render an equivalent to the true owner, from the like general obligation. The law, which always intends justice, implies a promise. * * * * * * * * * * As a general rule, undoubtedly, a city corporation is only liable upon express contracts authorized by ordinance. *The exceptions* relate to liabilities *from the use of money* or other property *which does not belong to her*, or to liabilities springing from the neglect of duties imposed by the charter from which injuries to parties are produced."

Again, in the case of Marsh v. Fulton County, 10 Wall., 684, decided by this court in 1870, where it was

held that certain bonds, issued by the defendant there, were void for want of power in the officers issuing them, the court, speaking through Field, J., in closing its opinion, said: "We do not mean to intimate that liabilities may not be incurred by counties independent of the statute: undoubtedly they may be. The obligation to do justice rests upon *all persons*, natural and *artificial*, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation."

So, also, the Supreme Court of Wisconsin in a case where a municipality of that state sold its bonds, and received the money of the plaintiff therefor, and the bonds turned out to be void for want of power on its part to make them, and it was sued upon an implied assumpsit to recover back the money, held that the action was properly brought, and affirmed the judgment for plaintiff.

Paul v. Kenosha, 22 Wis., 266.

Judge Dillon, in his work on Municipal Corporations, §§ 383 and 750, recognizes the doctrine of the implied liability of municipalities, and cites in support of his views the authorities above quoted from ,and others.

In note 2 to § 88 of the second edition of the work, the learned author, in connection with a discussion of the question of the validity of bonds issued by municipalities in Iowa in excess of the amount allowed by the Iowa constitution, also says:—

"If the bonds are void and the city has received value, it would be liable to pay back what it had received from innocent persons, or else the provisions of the constitution would operate to ensnare and defraud those who deal with it."

Again, the New York Court of Appeals, in a late

case before that court, after quoting from and approving Argenti v. San Francisco, *supra*, says:

"It has often been adjudged that if a city obtains money on a void bond, or for an illegal tax, or by mistake, and the money goes into the city treasury, the city can be compelled to refund. If it obtains property under a void contract, and actually uses the property, and collects the value of it from property owners by means of assessments, the plainest principles of justice require, that it should make compensation for the value of such property to the person from whom it was obtained."

Nelson v. Mayor, 63 N. Y., 544-5.
See, also, Mayer v. Mayor, *Id.*, 455.

So, also, in the recent case of Gause v. City of Clarksville, *supra*, decided at March Term, 1879, of the U. S. Circuit Court for the Eastern District of Missouri, which was an action to recover the amounts of certain negotiable bonds issued by the defendant for money borrowed for the purpose of improving its streets and wharf, the question arose thus: a demurrer was interposed to the petition, the ground of which was that the defendant by its charter had no express power to borrow money, and that none such could be implied. The petition failed to state (what was claimed by plaintiff to be the fact) that the money so borrowed had been in fact used for the purposes for which it was borrowed, and plaintiff proposed if the court deemed the allegations essential to a recovery on the bonds to so amend his petition as to state the facts accordingly. The demurrer was sustained; the court holding for reasons set forth in an exhaustive opinion delivered by Judge Dillon [Treat, J., concurring], that the city had no power, either express or implied, to borrow money, or to make the bonds. But, speaking of the allegations proposed to be added by amendment, in respect to the use made of the money for which the

void bonds had b en given, the following was said at the close of the opinion [8 Cent. L. J., pp. 363 and 364, top]:

"It will not validate these bonds *so as to make them* the basis of a recovery, even if it be shown that the money borrowed was in each instance used for the purpose for which it is recited in the bonds to have been borrowed. But the plaintiff may amend and add, *in respect of these bonds*, counts in the nature of counts *for money had and received.* Adhering to the decision of this court (Treat, J.,) in Wood v. Louisiana, at the last term, the present holder of the bonds will then be treated as the assignee of the original holder or payee in respect of the money actually lent to the city; and if, after the city obtained it, the same was in fact expended for the erection and repair of wharves or the improvement of streets, or possibly if expended for other authorized municipal purposes under the authority of the city council, the amount advanced with lawful interest, less payments received on account thereof, may be recovered."

(Citing) "Dillon Munic. Corp., Sec. 730 (?) [750]; Paul v. Kenosha, 22 Wis. 266; Shirk v. Pulaski County, 4 Dill., 208; 4 Cent. L. J., 390; Oneida Bank v. Ontario Bank, 21 N. Y., 490; Mayor, etc., v. Ray, 19 Wall. 468, 484, per Hunt, J."

And in the still more recent case of Anthony v. Jasper County, decided by this court at the last term, being No. 128, Oct. Term, 1879, which was an action on the coupons of bonds void for want of registration, under the said act of March 30, 1872, and fraudulently antedated the same as in the case at bar, and where this court held such bonds to be void in the hands of an innocent purchaser for value before maturity, it is stated in the opinion of the court in connection with the discussion of the question of estoppel, as follows:

"There can be no doubt that it is within the power of

a state to prescribe the form in which municipal bonds shall be executed in order to bind the public for their payment. If not so executed, they create no legal liability. *Other circumstances may exist which will give the holder an equitable right to recover from the municipality the money which the paper he has got represents*, but he has no bond which he can enforce as such, or which can be put on the market as commercial paper."

Applying now the rules of law as thus expounded to the facts as found, there can be no doubt that defendant's case falls within them, and that the judgment below was right.

The judgment shows that the defendant, a non-resident of Missouri, and as such presumably unacquainted with the laws of that State, in August, 1873, and later, purchased in the stock market at St. Louis, of certain stock brokers there, some $21,000 of negotiable bonds of the plaintiff, bearing date January, 1, 1872, and due in 1887, paying for them at the rate of ninety cents on the dollar; that at the time he so bought he was ignorant of the fact that they had not been previously issued, or that they had been issued subsequently to the taking effect of said Act of March 30, 1872, or that they had been antedated, or that their recitals were false, or of any other fact that would invalidate them, but believed them to be what on their face they professed to be, and to be valid; that, of the said bonds so purchased by him, two had been previously bought by two other persons under like circumstances from the same brokers, and had been by them sold back again, for value, to them, and by them to defendant; that, in fact, at the time defendant, and his said assignors of said two bonds, bought them of said brokers, all the bonds so bought were the property of the plaintiff in error, having never been theretofore, in fact, negotiated, or attempted to be negotiated by it, but having been placed then for

the first time in the hands of said brokers for sale; that said bonds, in fact, had not even been signed and sealed until July, 1872, long after the passage of the Act of March, 30, 1872, and had never been registered, as by the fourth Section thereof it was required they should be, before they should "obtain validity or be negotiated;" that, however, they were antedated as of January 1, 1872, so as to make it fraudulently appear that they were issued before the act, and therefore did not need to be registered, and so as to avoid the registering of them; that the moneys paid by defendant and his assignors were accounted for, and, less the brokers' commissions, paid over to the plaintiff's fund commissioner, who by ordinances duly passed by its city council, was charged with the duty of negotiating them, and of using the proceeds thereof in paying its debts and expenses; that said commissioner, in fact, applied and used part of said proceeds in paying off past due bonds, coupons and warrants of plaintiff, and the remainder paid into the city treasury; and his action in that regard on report to the council was approved, and all the paid bonds, etc. burned up by it in evidence of such approval, and that in 1876, plaintiff, after paying the interest on the bonds for a year or two, ceased altogether and wholly repudiated them as invalid for want of registration, and on demand from defendant to repay him his money, refused to do so.

Thus it appears that plaintiff, by reason of a fraudulent device, of which defendant was ignorant, got possession of his money in exchange for bonds, which it is not disputed but on all hands is confessed, were invalid; also that the invalidity of the bonds consisted—as in the case,—of parol contracts invalid under the statute of frauds,—in a failure on the part of the plaintiff to do a formal act prescribed by the registration statute as essential to the complete execution of them. [Anthony v. Jasper county, *supra*]. It further appears that in all

other respects the bonds were completely executed, and that they were being sold by proper authority for a purpose warranted by plaintiff's charter, namely—the borrowing of money to pay its debts, and that the money received of defendant was in fact actually applied to that purpose. And it further appears that plaintiff, on discovering the infirmity of its pretended contract, elected to repudiate it on account thereof, and so left the defendant no recourse but to disaffirm the contract and sue for his money again.

And so we submit that the facts found show, that on nearly all of the grounds of recovery illustrated in the cases cited—that is to say, on the ground of money paid by defendant in ignorance of fact, of money obtained by plaintiff by means of its own deceit, of money got without consideration, and of money obtained upon a contract not completely executed by plaintiff and repudiated by it, because not so executed, the defendant was entitled to recover, and the judgment of the lower court is right.

But we are here confronted with the objection from the other side [plff's brief, pp. 3 and 6], that the negotiation of the bonds by the city before registration was *prohibited* by the registry law, and that the defendant, in paying his money, and receiving the unregistered bonds, having notice of the law, was in *pari delicto* with the city, and, therefore, not entitled to recover; and Thomas v. Richmond, 12 Wall., is cited in support of the objection.

Answering this objection, we have to say:

1. There is no earthly analogy between the case at bar and the case cited. The law underlying Thomas v. Richmond was a law forbidding the issue of notes for cir-

culation as currency by unauthorized persons, and was highly penal in its character, exposing *the receiver*, as well as the issuer, or passer of the inhibited notes to pains and penalties. [12 Wall. *supra*, 350 and 353.] On the other hand, the Missouri Statute has no prohibition, no penalty, no *delictum* in it. It in no wise prohibits the negotiation of the bond before registration. It provides that "before any bond hereafter issued * * * * * shall *obtain validity*, * * * * * such bond shall first be presented to the State Auditor," and be registered. [Session Laws of 1872, § 4, p. 57, appendix (*infra.*)] It merely prescribes registration as a condition of life—as a new element in the due execution of the bond, and necessary to its becoming a valid instrument; [Anthony v. Jasper County, *supra*]; it makes negotiation before registration no offense; no penalty is inflicted upon either negotiator or receiver—neither the one nor the other is in any sense an offender, as the learned counsel for the plaintiff would seem to suppose. The sale of an unregistered bond is no more prohibited than is a parol contract for the sale of land prohibited by the statute of frauds. In both, all that the law attempts to accomplish is to withhold validity, or vitality, from the transaction not in conformity with the law's provisions. There is nothing in either law which gives to the non-observance of its requirements the slightest semblance of criminality or immorality, and no rule of public policy is violated by non-compliance with the law in the one case more than in the other.

Brandeis v. Neustadt, 13 Wis. 154.

2. But if it were conceded that the law made the city an offender by thus negotiating these bonds, the facts found completely exonerate the defendant from any share in the guilt, as we will presently show. The argument by which the defendant is proved to be in *pari delicto* runs thus: The law required the bonds to be

registered before they were negotiated, and was a public law of which every one was bound to take knowledge. The city violated the law by selling before registration; the defendant bought knowing the law, and thus knowing knew that the city, in selling, was violating the law, and the defendant thus knowing, by buying became partaker of the city's guilt. The argument leaves out of sight the conceded and vital fact, that the bonds bore a false date, and the question whether the defendant was cognizant of that fact. The defendant was obliged to know, as a matter of law, that a municipal bond "thereafter issued"—issued after the registry law took effect, was invalid if not first registered; but he was not bound to know that the bonds, having all the *indicia* of bonds issued prior to that event, were in fact issued subsequently. Whether they were issued before or after the registry law, *was a question of fact*, and the law indulges no presumption as to how the fact was, much less will it presume the defendant's knowledge of the fact. In an action on the bond, where the question is material to the defense of the obligor, it is competent for him to allege and prove the fact [Baily *et al.* v. Tabor *et al.*, 5 Mass. 286], and if it turn out that in point of fact the bond was issued after the law took effect, we concede that the holder can not recover *on the bond* as such, no matter how innocently he obtained it; not because he *is particeps criminis* with the obligor, but because the legislature, in its wisdom, has seen fit, when the facts are found to exist, to make the instrument of no validity. [Bailey v. Taber, *supra*, 293.

The facts found acquit the defendant absolutely of all knowledge of, and of all participation in, the irregularities that invalidated the bonds The finding declares; [Rec., p. 17, top.]

That "although the said bonds were made and executed *after* the law * * * requiring the registration of bonds * * * took effect, yet the defendant"—

(not the mayor and clerk merely, but the city, by every officer and agency that could speak for the city or bind the city, the *defendant*)—"for the purpose of evading the provisions of said registration law, and with the intent to make it falsely appear that said bonds were not subject to the requirements of said law, caused said bonds to be ante-dated as of the 1st of January, 1872, and *caused* it to be falsely stated in them that they were signed, countersigned and sealed on the day last named." It is further found [Rec. p. 17]:

"That at the time the plaintiff and the said Dorsheimer and the said Gibbons, respectively, made their said purchases and paid their money to said broker, they were and each of them was *wholly ignorant of the fact that said bonds were made and issued subsequently to the taking effect of said registration law, and that they had been ante-dated, and that the said recitals thereof were false, or of any fact that would invalidate them*, but on the contrary thereof, they and each of them accepted the said bonds by them respectively bought and paid and advanced their money therefor *in good faith, believing said bonds to be what they on their face professed to be*, and to be obligatory upon the defendant."

The finding does not leave it an open question that the defendant bought in open market, from a reputable broker, without notice, and with the most confident belief that the bonds had been issued, as they purported, before registration became necessary. He not only bought innocently, and paid his money, upon a mistake of fact and upon a false belief of the facts, but he was purposely led into the error by a preconceived, premeditated, deliberate fraud, committed by the city with express *intent to deceive*. And yet we are told the defendant was in *pari delicto* with the plaintiff! To issue a bond without previous registration is not a crime. There is no law that makes it so. There being no crime, there

could be no equality in guilt. The nearest approach to a crime in the case was the fraud of the city in ante-dating the bonds and selling them, and procuring the defendant's money under false appearances; but if this were a crime, the defendant would only be, what in fact he is, a *victim*, not a *particeps criminis*. The idea that, *as a matter of fact*, the defendant was *in pari delicto* with the plaintiff is, in view of the facts found, simply absurd. The doctrine of Thomas v. Richmond, *supra*, surely has no just application here.

Again the counsel for plaintiff in error, in further support of said objection that the money sought to be recovered was paid for bonds issued in violation of the prohibitions of the registration law, cites the case of Hackettstown v. Swackhammer, 37 N. J. (L. R.) 196, and quotes from the opinion of the court therein. [Plaintiff's brief, p. 7.]

That was a case where suit was brought on a note of a town, given by its officers for money borrowed for its use, and in fact expended for its benefit. The town, by its charter, had no express power to borrow money, and the real question in the case was whether in the absence of such *express* power it could be held to have an *implied* power to borrow, and, as incident thereto, to give notes. The court decided against any implied power, and that the note was therefore not the act of the town. The question of whether the town would be liable as on an implied assumpsit to repay the money rereived did not arise directly, but was only incidentally discussed. The view of the court as to that was, that, inasmuch, as to hold it so liable, would in effect nullify the supposed intention of the legislature in refusing to allow it an express power to borrow, it therefore ought not to be so held. The language of the court, quoted by plaintiff's counsel, is from its argument in support of this view, and whatever may be said of its applicability

to the facts of that case, is certainly wholly inapplicable to those of the case at bar. In the latter it appears that the power to borrow money is expressly given to the municipality, and no limit is fixed as to the amount that may be so borrowed. The so-called violation of the law committed by it did not consist in the creating a debt, which it was expressly or impliedly forbidden to create. So far as the negotiating of an agreement for obtaining the lender's money, and the actually taking it pursuant to that agreement, is concerned, there was no violation of the registration law. Under its charter and that law, it had ample power to borrow defendant's money and to give a mere parol promise for its repayment. Had it in fact attempted to make only a parol contract of borrowing, its contract, so far as the registration law goes, would have been valid. But it attempted instead to evidence the contract by negotiable bonds, and in so doing it failed of its purpose, and a complete exercise of its power, only because of non-compliance with the formal requirements of that law as to the execution of such bonds.

In the case quoted from the facts were widely different. There there was a total want of express power to borrow or to give any sort of promise, parol or written, to repay money borrowed. While it may perhaps be reasonable that a municipality, which has no express power whatever to make a debt by borrowing money, ought not to be held to have the power to become so indebted by implication, it does not follow that one which has an express power to borrow to an unlimited extent should not be held liable upon an implied assumpsit to repay money it receives in an attempted exercise of that power, such exercise being incomplete only because of its non-compliance with statutory formalities in regard to the execution of the instrument, given as evidence of its promise to repay such money. In the one case, the implication of a liability and power may be

said to virtually create a new power forbidden to the corporation, or at least not intended to have been given it. In the other, such implication creates no new power, but only requires the municipality to do justice, and to repay to the unfortunate lender such a sum, as under the power which it already has, it might by a properly executed contract have expressly promised to pay him.

The case of Hackettstown *supra* is thus also inapplicable, and can give no aid in determining the questions raised by the objection.

Its inapplicability seems to be recognised by plaintiffs's counsel, who on page eight of his brief, alludes to the difference in the facts of the two cases in respect to the express power given by the charter of plaintiff to borrow money. He, however, seeks to avoid the effect of this difference by a second objection, based upon a provision, contained in the charter of plaintiff, as to the rate of interest to be paid by it for money borrowed. [Plff's. brief, bottom p. 3, and top p. 4.]

This provision is as follows:

"SEC. 22. It shall be lawful for the city to borrow money at any rate of interest not exceeding ten per cent per annum."

From the argument of plaintiff's counsel, it is not plain whether this objection is that the contract of borrowing was *ultra vires* the corporation, or that it was unlawful, as being in violation of the general usury law of Missouri. Although referring alone to this provision of the charter as the basis of his complaint, he yet speaks of the transaction as a "usurious contract." As in some cases there is a marked distinction between contracts usurious and contracts *ultra vires*, we will consider the objection in both aspects. Before doing so, however, we will remark *in limine* that, considered in either, it ought not now to be heard at all, because not made in any way

before. "The point is an after-thought, suggested by the pressure and exigencies of the case."

No allusion is made to it in the pleadings or the court's finding, or the opinion of Judge Treat accompanying the finding. The record shows no such ground of defence relied on, either in court or out. On the contrary it shows that the city, from the first, put its refusal to longer pay interest, upon the express ground that the bonds were void, because not registered. The special finding states [Record p. 18] that the city refused to pay, and declared it to be its purpose not to pay, "*because, as claimed by the defendant*, the said bonds were invalid and void *by reason of their not having been registered* as required by said registration law."

The objection we therefore submit comes too late, for, as was said by this court in Railway v. McCarthy, 96 U. S., 267: "where a party gives a reason for his conduct and decision touching anything involved in a controversy, he can not, after litigation has begun, change his ground and put his conduct upon another and a different consideration; he is not permitted thus to mend his hold."

But had the objection been made in due time it would not have availed. For—

Firstly. Considered as an objection that the contract of borrowing was *ultra vires*, because made at the rate of eleven instead of ten per cent. per annum interest, it in nowise meets the claim of defendant in error. If *ultra vires* it was only void, and that it certainly was anyhow under the registration law. The bonds, as bonds, we agree, never became valid,—never "obtained validity." They always were void. They were never completely executed, and even if they had been sold at par would still have been void. That they were instead sold at such rate, as that the money obtained by their sale was in effect borrowed at a greater rate of interest than

ten per cent per annum, makes them no more void. Nor does it make less real the fact, that plaintiff has got the defendant's money in the imperfect exercise of a lawful power, and without any consideration whatever. Also, none the less real ought to be the conclusion therefrom, namely: that the plaintiff having the money under such circumstances is "*obliged by the ties of natural justice and equity to refund it.*"

[Lord Mansfield].—Moses v. McFerlan, 2 Burr, 1010; Towers v. Barrett, 1 T. R., 135.

To adopt such conclusion, and thereby compel plaintiff to repay defendant's money, will not have the evil consequence predicted of it in plaintiff's brief, nor, as in the Hackettstown case, subject it to a liability it was not intended by its creators it should be subject to. It will not be an enforcement in any sense of "a claim which the law has declared void." It will only result in an implication that the plaintiff has borrowed defendant's money at six per cent per annum, to be repaid upon demand,—a contract entirely within the limits of the corporate power. It will not enforce a contract of loan for fifteen years at ten per cent., but one payable on demand at six per cent. It will enforce a contract which plaintiff did not in fact expressly make, but which it was clearly within its power to have made, and which every principle of justice requires that it should be held to have made.

That the plaintiff in error by the enforcing of this implied contract will be "no better off" [plaintiff's brief, p. 8] than it would be if it were allowed to retain the money, and yet avoid the obligations given for it, we concede; but that it will be no better off than if those obligations had been held valid and enforced, we deny. Clearly the city by its repudiation is a gainer pecuniarily in either case. If held liable to repay defendant's money with six per cent interest only, she has saved the discount of ten per cent., and four per cent. of the interest

thereon during the litigation. If held not liable to repay, she would, in fact, have made a most fortunate speculation, and might well rejoice in the illegal and wicked action of her officers. By their abuse of their power she would have been enabled to wipe out her old debts and begin anew. To reward that abuse by permitting her to retain the money received thereby, would be to encourage her and them to still further abuse, and at the same time punish the lender with a severity fit only for the repression of infamous crimes.

And this leads us to observe again that the transaction, considered as one *ultra vires* of the corporation, was not criminal or immoral or even illegal, in any such sense as to involve turpitude, or to make the rule, which denies to voluntary participants in a criminal or immoral transaction the right to recover money paid in the course thereof, apply. No penalty is imposed by the charter upon the city, or its officers for borrowing money at eleven per cent. interest; much less is any imposed upon the person lending to it at that rate. The agreeing to pay such interest is accompanied with no consequences other than that it is in fact no agreement. If such agreements are attempted to be made, any tax payer may cause their enforcement to be resisted. And that is a protection against them. "But,"—as was well said by the New York Court of Appeals (Comstock, J.), in a case where the distinction between contracts void as being *ultra vires*, and those void as in violation of prohibitory or penal statutes, arose and was discussed,—"it is one thing to say that a void or forbidden contract cannot be enforced, and quite another to hold that both parties are involved in moral guilt, so that neither can disaffirm it and recover upon an implied assumpsit the money or value he has advanced."

Tracy v. Talmage, 14 N. Y., 16.

As is stated in the same opinion, the distinction is one recognized almost universally, and is, that in the

former case there is the right to disaffirm and recover, while in the latter there is not.

Said the court further in that case (p. 217): "It is admitted that the contract of a corporation, which it has no legal capacity to make, cannot in its terms be enforced. *But does it follow that the alleged transgressor may appropriate without compensation the money or the goods of the person with whom he deals?* There are no doubt authorities upon the general question, which cannot be reconciled, *but it is safe to say that such a rule as this has never been established.*"

And in the later case in that court, of Curtis v. Leavitt (15 N. Y. 1), where it was held, after elaborate arguments, by the majority of the court, that a recovery could be even had upon the contract of lending, although the security given for the money lent was void as *ultra vires*, and issued in violation of law, [pp. 95 and 96,] the distinction referred to was thus discussed by Selden J. [p. 278]:

"It is clear that contracts which are *ultra vires* are held void at the instance of the corporation making them, simply because public policy requires the enforcement of the rule, which limits corporate bodies to the exercise of their legitimate powers. To hold their express contracts void, if unauthorized, will no doubt promote the observance of this limitation. It operates as a salutary restraint upon both parties, by depriving each of the power of enforcing an advantageous bargain. But to go farther, and hold that corporations, when called upon not to perform that which formed the inducement to the contract with the other party, but simply to return what they have received without consideration, may set up their own violation of law as a defence, would be to offer a direct premium for the fraudulent abuse of their powers. I cannot doubt that a sound policy will be promoted by restoring the parties in all such cases to their original position. It leaves no inducement for either

party to contravene the law. The corporation is compelled to return just what it has received; the other party gets no more than he has parted with. *It is believed that not a solitary case can be found which stands opposed to this just and salutary rule.*"

See also case of

Oneida Bank v. Ontario Bank, 21 N. Y. 490.

So, then, we submit that, considered as an objection that the money was paid upon a contract *ultra vires* of the plaintiff in error, it affords no obstacle to defendant's recovery in this action, even if he in fact had known that the contract was for that reason unwarranted.

Secondly. Considering, on the other hand, the objection to be that the sale of the bonds at a discount was in effect a usurious contract of lending, it cannot avail plaintiff here for two reasons:

1. Because, under the laws of Missouri, usury, to be availed of as a defense, even in a suit on the contract itself, must be specially pleaded.

1 Wag. Stats., p. 783, § 5;
Bond v. Worley, 26 Mo. 253.
Ransom v. Hays, 39 Mo., 448.

And this was not done in this case.

2. Because, under the same laws, the taking of interest above the rate of ten per cent. does not avoid the contract, except as to the excess, but allows the same to be enforced; and in a suit even upon the contract, judgment goes against the borrower for all the money he got, and *ten* per cent. interest. Much more, therefore, in a case where there is no attempt to recover on the contract, but only for the money paid, and *six* per cent. interest, should there be a right of recovery.

Montany v. Rock, 10 Mo. 508;
Bank v. Harrison *et al.*, 57 Mo. 503;
1 Wag. Stats., p. 783, §§ 4 and 5.
Ransom v. Hays, 39 Mo., 448.

Under the Missouri law, the usurious contract, so far as the amount lent, and interest up to ten per cent. is concerned. is not void. Nor is there any idea of turpitude or moral wrong under it, in lending at an excessive rate. So that, even in the case of one knowingly and wilfully entering into an usurious contract in Missouri, there would be no rule of moral or public policy, which, upon its turning out that the contract, for any other reason, was incomplete or imperfect, would forbid his recovering back from the borrower the money lent, in an action for money had and received.

Speaking of the character of the usury laws of England, and of the states of the Union other than Missouri, *Lewis, J.*, delivering the opinion of the court in Bank v. Harrison, *supra*, (57 Mo., p. 509), said: "We have, in Missouri, no such legislative acts. The 'iniquity' of an usurious loan has long since disappeared from our jurisprudence, except as to the excess above the authorized rate of interest. Even in courts of equity everywhere—which are considered as the purest tribunals—when usury is established, the contract will be enforced for the sum loaned, and the borrower compelled to pay it back. The U. S. Supreme Court (4 Pet. 205) says, that 'usury is now only considered an illegal or immoral act, because it is prohibited by law.' Says another authority: 'Usury has now ceased to be a crime. It is unlawful to the extent that it is made so by statute, and no further.' (7 How Miss. 535). It would seem, then, that the measure of illegality or immorality is the extent of the prohibition. And that applies not to the *loan*, in which there is no moral vice, but only *to the forbidden excess of interest.*"

Whether therefore, the objection be considered as being that the act of selling the bonds was *ultra vires* the city, or that it was in violation of the usury laws of Missouri, it could not avail, even if defendant in error had been cognizant of the facts which made it *ultra vires*, or rendered it usurious.

And this leads us to repeat, as a final and complete answer to the objection, considered in both its aspects, what we have already said in respect to the objection, that the issue of the bonds before registration was *prohibited* by law, and that the defendant was in *pari delicto* with plaintiff in the law's breach, namely; that granting that there was any violation of law,—any transcending of corporate power,—in the sale of the bonds, or any illegality by reason of usury; and that such would avail to defeat a recovery by anyone cognizant of the violation, and sharing in the wrong thereof; yet the objection is without force as to defendant in error, who, as the verdict finds, "was wholly ignorant * * * of any fact that would invalidate the bonds," and, as a consequence, wholly innocent. If there was any abuse of corporate power, he knew nothing of it, and gave no aid or sanction to it. If the contract was usurious, it was so without his consent. He was not dealing directly with the city, but with brokers whose principal was unknown to him. He knew not that the bonds were being then put forth for the first time by negotiation of the city through those brokers. He naturally supposed, and the fraudulent artifice of the city was designed to lead to the supposition, that the bonds had been issued by the city at the time they bore date, more than eighteen months before he bought them, and that they were already offered on the market as the property of third persons, in the usual way. Without knowledge that they were being sold for the city, he could not be held to know that it was selling at a discount, and thus borrowing money at more than ten per cent. interest.

It is idle to say that he was bound to know the extent of the authority of the city's agents and officers. Of course, he was bound to know the law: that is conceded; but he was not bound to know the fact that the bonds then being sold in open market, eighteen months after the time when they, on their face, purported to have

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been issued, had, in fact, never been issued, and were then the property of the city. They were payable to bearer, negotiable in form, duly signed by the proper officers, sealed with the city's seal, and in all respects good, so far as appearances went. The rate of interest they bore was lawful. Comparing the terms of the powers given to the city by its charter, and to its officers by the ordinances of its city council, they seemed in all respects to be within those powers. Had the bonds as such been otherwise valid—that is, duly registered—it is at least extremely doubtful if the objection in either aspect would be good, as against defendant in error, in a suit based upon them.

3 Parson's Cont (5th Ed.), p. 147;
Law v. Sutherland, 5 Gratt., 357;
Whiteworth v. Adams, 5 Rand, 333;
Shackelford v. Morris, 1 J. J. Marsh, 497;
Hansborough v. Baylor, 2 Munf., 326;
Holmes v. Williams, 10 Paige, 326.

But, however that may be, certainly it ought not to avail as against him, seeking not to enforce the contract, but only to get back his money, with which he, without any suspicion of wrong, was induced to part, by means of the false tokens and pretenses of the city. If any authority for denying him this relief exists, it has not been produced by counsel for plaintiff in error, and has not been discovered by us. We submit that none such exists, and if it did, it ought not to be followed.

Again, plaintiff's counsel, for a third objection to the application of the doctrine relied on by defendant, to the facts found, presents, that the city in receiving and using defendant's money, did not pursue the *mode* prescribed by its charter for the exercise of its powers; that the mode so prescribed was by ordinance, and that the action of its officers in that regard was never authorized by any ordi-

nance, other than those recited in the finding, viz: Nos. 525 and 612, which it is argued were themselves violative of the charter, and had also been repealed by Sec. 11 of the act of March 30, 1872. [Brief, pp. 4, 10, 11 and 12.]

This objection—which also seems to be the result of an afterthought—is also untenable.

In the first place, even granting that ordinances 525 and 612 were invalid, or repealed, at the time defendant's money was paid to the plaintiff, and was used by it, the plaintiff would still be liable. Ordinance, or no ordinance, she, with the knowledge of her city council, accepted the proceeds of the sales of bonds made by her fund commissioner, under the supposed authority of said ordinances, and approved his application and disposition of such proceeds for her benefit thereunder. This was done by the city council, sitting as such, in the most positive way possible, namely, by approving the commissioner's accounts, and themselves, in council assembled, burning up the old bonds, coupons and warrants, returned as vouchers thereto, all of which had been paid out of said proceeds. Besides this action of the council, the inhabitants and taxpayers also ratified the conduct of their officers in negotiating the bonds and in receiving and applying their proceeds, by paying the interest for two and a half years upon said bonds. Under such circumstances, it was not essential to the implication of a liability and of a promise to repay the money that there should have been any ordinance. The provisions of the charter requiring the action of the city council to be by ordinance, apply only to express contracts, not to implied ones. See cases of

Gas Co. v. San Francisco, 9 Cal. 469 and 470.
Argenti v. same, 16 Id. 282 and 283.
McCracken v. same, Id. 631 and 632.
Piemental v. same, 21 Id. 361.
Dillon on Mun. Corp. (2d ed.) §750, p. 856, note 2.

But, secondly, the ordinances, Nos. 525 and 612, if authority by ordinance were necessary, were quite sufficient. No. 525 created the office of fund commissioner, and prescribed his duties as to borrowing money by negotiating bonds, and as to paying off the city's debt with the money borrowed. No. 612, passed in March, 1871, authorized the same officer to borrow enough by negotiating bonds to pay off the whole debt, shown to have been $150,000, of which $100,000 was about to mature. [Record, pp. 14 and 15.]

There is no foundation for the claim that these ordinances were *repealed* by the enactment of section 11 of the act of March 30, 1872. In the first place, the ordinances, as such, could not be *repealed* by the legislature. They might have been deprived of all force by the enactment of a law, so amending or repealing the plaintiff's charter, as to take away the corporate powers, which they were enacted to carry out. And that, we suppose, is what the counsel mean to claim was done when he says they were repealed. But that, too, did not happen. The power to borrow money, given by the charter both in section 2, of article 3, and in section 22, of article 7, is not at all inconsistent with the provisions of section 11, of the act of March 30, 1872. The latter act relates to an entirely different matter from the charter, and does not either expressly or impliedly repeal any of its provisions. Section 11 only furnished a way by which a town, having a bonded debt, could exchange with the persons *already holding* its bonds, *not registered*, and, as such, not entitled to the benefits of the provisions of sections 5, 6, 7, 8, 9 and 10 of the act, which established a system of collecting and applying taxes for the payment of *registered* bonds different from the ordinary one, new bonds, which should be registered, for their old ones. It requires the "issue of new bonds *in lieu of the present ones, upon such terms* * * * *as may be agreed upon* between the county,

city or town, *and the holder* of its bonds." It has no reference to and makes no provision for a case of the "present holder" not agreeing to accept new bonds in lieu of old ones, and hence of the necessity of raising money, by borrowing or otherwise, to pay off the old ones. Nor does it have any reference to, or make provision for, the case of borrowing money, either with or without the issue of bonds, to pay other indebtedness than bonded debts, such as warrants, current expenses, etc. It clearly, therefore, does not in any way repeal or modify the ordinary powers given to plaintiff, and its city council, of "borrowing money upon the credit of the city," and of "providing for the payment of the debts and expenses of the city."

Nor is there anything in the claim, that these ordinances were *invalid* or illegal—as being in violation of the plaintiff's charter. The exact ground of this claim is not very clearly disclosed in plaintiff's brief; but it seems to be, that the ordinances authorized the borrowing of money at more than ten per cent. interest, in that they authorized the sale of bonds at discounts of 5, 10, and 15 per cent. respectively.

This, if the facts were as claimed, would not invalidate the ordinance. The only effect would be that, to the extent that it attempted to authorize the agreeing for the excessive rate, it would be of no effect. For all other purposes it would remain effectual. But, in fact, the ordinances do not in terms authorize the borrowing at the excessive rate. True, they authorize the sale of bonds at discounts, as stated; but they do not prescribe the rate of interest which the bonds so sold at such discounts shall bear, nor the length of time they shall run. And whether money borrowed by a sale of bonds at these discounts will amount to a borrowing at rates greater than ten per cent. per annum or not, depends upon the rates of interest agreed for in the bonds sold, and the

length of time they are to run. Money borrowed by the sale, at a discount of 15 per cent., of a fifteen year bond, bearing interest at the rate of one per cent. per annum, would be borrowed at a rate of interest only a little over two per cent. per annum. And the selling of bonds bearing six per cent. per annum interest, and running thirteen years, at a discount of ten per cent., is borrowing at a rate of interest less than ten per cent. per annum. When these ordinances, therefore, authorized the sale of bonds at certain discounts, without specifying the kind of bonds to be so sold, they must be understood to refer to bonds such as that the sale thereof at those rates would amount to borrowing at a rate within the charter limit. It is to be presumed that the council, in enacting the ordinances intended to keep within the limits of the corporate powers, rather than the contrary.

So, then, the ordinances under which the plaintiff's agents purported to be acting, were not repealed nor invalid, but were in full force and effect when plaintiff received and used defendant's money; and they fully authorized the receipt of that money, and its use and appropriation in the way, and to the purposes for which it was appropriated. And so, in any view of the law as to the necessity of an ordinance in order to render plaintiff liable upon an implied assumpsit, the third objection made by plaintiff's counsel can not be maintained.

III.

No point is made by the plaintiff's counsel in respect to the right of defendant in error to recover, as assignee of Dorshiemer and Gibbons, the money ($1,800) paid by them for the two bonds which they originally

bought of the plaintiff's agents, and afterwards sold to defendant in error [Record, p. 17]; and no reference thereto on our part is perhaps necessary. That he may so recover the same, as well as the money paid by himself under the like circumstances, is sustained by reason, and an abundance of authorities, to which, should the point be considered to require the attention of the court, we will simply refer, without the presentment of any argument, other than such as is contained in the opinions delivered in the cases cited. The cases bearing on the question are:—

Oneida Bk. v. Ontario Bk., 21 N. Y., 490;
Mayor v. Ray, 19 Wall., 483, 484;
Memphis v. Brown, 20 *Id.*, 289 and 318;
Richards v. Allen, 17 Me., 296;
Shirk v. Pulaski Co., 4 Dill., 214;
Schl. Dist. v. Lombard, 2 *Id.*, 493;
Gause v. Clarksville, 7 Reporter, 519;
Same case, 8 Cent, L, J., p. 364.

We respectfully submit that the judgment of the court below is just and free from error, and should be affirmed.

JOHN D. S. DRYDEN,
JOHN W. DRYDEN,
Counsel for Defendant in Error.

APPENDIX.

APPENDIX A.

The following are extracts from a Statute of the State of Missouri, published and found among the Session Laws of 1849, beginning at page 348, presented by counsel for defendant in error, for the convenient reference of the court, in the consideration of case no 515, to the October Term, 1880.

Title of the act:—"An Act to amend, and to reduce into one, the several acts incorporating the town of Louisiana, and to organize the same into a city of boundaries and general powers." Approved March,——1849.

ARTICLE I.

"Be it enacted by the General Assembly of the State of Missouri, as follows:—

SEC. 1. [This Section concerns only the boundary of the city.]

SEC. 2. [This Section constitutes the inhabitants, within the limits prescribed by the first section, a city, with certain powers therein defined.]

SEC. 3. [Relates to the division of the city into wards.]

ARTICLE II.

"OF THE COUNCIL AND OTHER OFFICERS, AND THEIR POWERS AND DUTIES."

[This Article contains sixteen Sections; concerns the city council, the election of its members, and its modes of proceedure.]

ARTICLE III.

"OF LEGISLATIVE POWER."

"SEC. 1. [Nothing pertinent.]

"SEC. 2. The city council shall have power within the city by ordinance, *First*, to levy and collect taxes. * * * * *Second*, to BORROW MONEY *on the credit* of the city; *Third*, to appropriate money, and to *provide for the payment of the debts and expenses* of the city." [Then follows in this Section the specification of divers other powers of the council, concluding with the *forty fifth*. Section 2 is followed by Sections 3, 4, 5, 6, 7 and 8, none of which, however, have any pertinence to the case in hand.]

ARTICLE IV.

"EXECUTIVE AND MINISTERIAL OFFICERS."

SEC. 1. The chief executive officer of the city shall be the Mayor, who shall be elected by the qualified voters of the city, who shall hold his office for the term of two years. * * * * * * * *

Sections 2, 3, 4, 5, 6, 7, and 8, [have no pertinence.]

"SEC. 9. There shall be a clerk of the city council, (who shall perform the duties of register, and such other duties as the city council shall direct,) a city treasurer, city constable, city attorney and city engineer, who in addition to the duties prescribed by this act shall perform such other duties as may be prescribed by ordinance. *There shall also be such other officers, servants and agents of the corporation as may be provided by ordinance*, to be appointed by the mayor, by and with the advice and consent of the city council, and *perform such duties as may be prescribed by ordinance;* and

such officers shall be removable at the pleasure of the city council by a majority of two-thirds of the city council."

SECTIONS 10, 11, 12, 13, 14, 15, 16, 17 and 18, being the remaining sections of Art. IV., are not pertinent.

ARTICLE V.

"OF ELECTIONS,"

and

ARTICLE VI.

"OF OPENING AND IMPROVING STREETS."

These two articles—the first containing seven, and the second, ten sections—have nothing in them bearing upon the case at bar.]

ARTICLE VII.

"MISCELLANEOUS PROVISIONS."

This article contains twenty sections, but nothing in any of them is pertinent in this case, except

"SEC. 8. This act is declared to be a public act, and may be read in evidence in all courts of law and equity in this State without proof"—in other words, the courts will take judicial notice of it.

APPENDIX B.

The following are extracts from a statute of the State of Missouri, published and found among the session laws of 1870, beginning at page 386, presented by counsel for the defendant in error, for the convenient reference of the court in the consideration of the case, No. 515, to the October term, 1880.

Title of the Act—"An act to amend an act entitled an act to amend and reduce into one the several acts incorporating the town of Louisiana, and to organize the same into a city, approved March 14, 1849, and the several acts amendatory thereof. Said acts when amended shall read as follows:

Be it enacted by the General Assembly of the State of Missouri, as follows:

ARTICLE I.

SECTION 1. All of the act above recited, and all of the several acts amendatory thereof, approved respectively on the 14th day of March, 1849; on the 27th day of February, 1851; on the 1st day of March, 1855; on the 15th day of January, 1857, and on the 16th day of February, 1865, are hereby repealed and the following act, articles and sections substituted therefor, to-wit:

"OF BOUNDARIES AND GENERAL POWERS."

"SEC. 2." }
"SEC. 3." } These three sections are almost identical with sections 1, 2 and 3 of Art I. of
"SEC. 4." } the law of 1841. See App. A, Art. I, *ante*.

ARTICLE II.

[This article is simply a reprint of the correspond-

ing article on the law of March, 1849. See Art. II, in Appendix A, *ante.*]

ARTICLE III.

[Sections 1, 2, 3, 4, 5, 6 and 7 of this article are the same, literally, as the corresponding sections of Article III, of the law of 1849, and they are, therefore, not reproduced here. [See Article III, in Appendix A, *ante.*]

"SEC. 8. The bonded or funded debt of the city, for all purposes, including one hundred thousand dollars subscribed, (or to be lawfully subscribed), to railroads terminating at, or passing through the city of Louisiana, shall not exceed the sum of two hundred thousand dollars; *provided, however*, that said debt may be increased to a sum not exceeding two hundred and fifty thousand dollars in all, by ordinance or ordinances, properly passed and submitted to an election, under authority of the city council, of all resident tax-payers of the city, that is to say, of all adult persons who shall have been assessed, and actually paid a tax on real or personal property for the year, or the year previous to the year, in which such election shall be held." * * * * *

[The remaining part of the section, and the remaining sections of the article, are not pertinent].

ARTICLE IX.

This article contains one section additional to the sixteen sections of the corresponding article in the law of 1849; with this exception, the two articles are identical. The additional section—section 19—relates alone to the duties of City Marshal. [See Art. II, App. "A."]

ARTICLE V.

and

ARTICLE VI.

[These two articles, like the corresponding articles

in the law of 1849, contain nothing affecting the case under consideration.]

ARTICLE VII.

[The eighth section of this article is identical with the eighth section of Article VII of the law of 1849. See Article VII, § 8, of Appendix "A."]

"SEC. 22. It shall be lawful for the city to borrow money, at any rate of interest not exceeding ten per cent. per annum."

There is nothing pertinent in the other sections of the article, and this is the last article of the act.

APPENDIX C.

Being such parts of the Act of Assembly of March 30, 1872, for the registration of bonds as the court will need to examine in determining this case, found in Session laws of 1872, p. 56 and following.

SEC. 1. * * *

SEC. 2. * * *

SEC. 3. * * *

"SEC. 4.—Before any bond hereafter issued by any county, city or incorporated town, for any purpose whatever, shall obtain validity or be negotiated, such bond shall first be presented to the state auditor, who shall register the same in a book or books provided for that purpose, in the same manner as the state bonds are now registered, and who shall certify by indorsement on such bond that all the conditions of the laws have been complied with in its issue, if that be the case; and, also, that the conditions of the contract under which they were ordered to be issued have also been complied with, and the evidence of that fact shall be filed and preserved by the auditor; but such certificate shall be *prima facie* evidence only of the facts therein stated, and shall not preclude or prohibit any person from showing or proving the contrary in any suit or proceeding to test or determine the validity of such bonds, or the power of any court, city or town council, or board of trustees or other authority, to issue such bonds; and the remedy of injunction shall also lie at the instance of any tax payer of the respective county, city or incorporated town, to prevent the registration of any bonds alleged to be illegally issued or founded under any of the provisions of this act.

"SEC. 5.—The state auditor shall receive a compensation of twenty-five cents for the registration of each bond hereafter issued to be paid by warrant drawn upon the

treasury of the respective county, city or town.

"SEC. 6.—The state auditor shall, annually ,on or before the first day of July, certify to the several county courts, city councils, or trustees of any incorporated town, the amount required during the next fiscal year, for the payment of maturing interest coupons, together with ordinary costs to the state of collection and disbursement of the same, which amount shall thereupon be levied as a special tax upon all property in such county, city or town, and shall be collected with the state revenue and paid over to the state treasurer to the credit of the several counties, cities or towns: *Provided*, That this special tax may be paid in coupons registered under this act, overdue, or maturing during the current fiscal year.

"SEC. 7.—The State Treasurer shall provide for the payment of maturing coupons, so registered, out of such funds, and no other, as may be in the treasury to the credit of the respective counties, cities and incorporated towns, whose bonds have been registered under this act, in the same manner as he does for those issued by the State, and allow, at the expense of the maker, not more than the same compensation for redemption to the bank or banks at which they are made payable, than he does for the redemption of State coupons.

"SEC. 8.—It shall be the duty of the State Treasurer to apply the amount remaining to any county, city or town, after deducting the same required for redemption of registered coupons maturing during the then current fiscal year, and six months thereafter, to the redemption of not matured bonds of such county, city or town, under the direction of the respective county court, city council, or trustees of any town. He shall certify at least once in every fiscal year, to the State Auditor, the several amounts and numbers of bonds and coupons by him, or through him, redeemed, and shall return such bonds and coupons, properly cancelled, to prevent their re-issue, to the makers thereof.

"SEC. 9. Nothing herein contained shall prevent any county court, city council, or trustees of any incorporated town of this state, to levy a larger tax for the payment of the maturing bonds, or to apply other means to such purpose; but all taxes levied for the payment of registered bonds or coupons, and all such sums of money which are appropriated for the same purpose, shall be paid into the state treasury, and all registered bonds and coupons shall be redeemed and cancelled by, or under the direction of the State Treasurer.

SEC. 10. The state shall be deemed the custodian only of the several taxes, so collected and credited to such county, city or town, and shall not be deemed in any manner liable on account of any such bonds and coupons, but the tax and funds so collected shall be deemed pledged and appropriated to the payment of the interest and principal of the registered bonds herein provided for, until fully satisfied.

"SEC. 11. Any county, city or town that desires to place its outstanding indebtedness, under the provisions of this act, may do so by funding the same, and issuing new bonds in lieu of the present ones, upon such terms and bearing such interest, with such length of time to run, as may be agreed upon between the county, city or town and the holders of its bonds; *Provided, however*, that the contract for funding, with the tefms of the same, shall be assented to by a majority of the qualified voters of such county, city or town, at a general or special election held therefor, and at least thirty days' public notice of the same shall be published in every paper in the county, city or town, and when there are none, then by four printed hand-bills put up in the most public places in every voting precinct in such county, city or town."

"SEC. 12. When any county, city or town shall order its outstanding indebtedness to be funded, as provided for in Section 11, a certified copy of the

order of election, shall be sent to the auditor, and he shall indorse the bonds issued under the same, as funding bonds under this act.

SEC. 13. Nothing in the provisions of this act shall be construed as to include any bonds that have been or may be issued by any municipal corporations for gas-works or water-works.

"SEC. 14. All acts, and parts of acts, inconsistent with the provisions of this act, are hereby repealed."

"SEC. 15. This act shall take effect and be in force from and after its passage." Approved March 30, 1872.

APPENDIX TO BRIEF AND RECORD.

THE CITY OF LOUISIANA, *Plaintiff in Error,* *vs.* THOS. J. WOOD, *Defendant in Error.*	No. 515. In the Supreme Court of the United States, October Term.

In Error to the Eastern District of Missouri.

On the second day of October, 1878, before the trial in the Circuit Court, the attorneys of record filed with the clerk of said circuit court a stipulation in writing waiving a jury in this cause; which stipulation remains in said circuit court among the files of the cause, and is in the words and figures following, to-wit:

THOMAS J. WOOD, *Defendant,* *vs.* CITY OF LOUISIANA, *Plaintiff.*	No. 1184. In the U. S. Circuit Court, Eastern District of Mo. Sept. Term, 1878.

By consent of parties, a jury is waived in this case. September 17, 1878.

DRYDEN & DRYDEN,
Att'ys for Plaintiff,
WAGNER, DYER & EMMONS,
Atty's for Defendant.

Now, as said clerk inadvertently omitted the said stipulation from the record certified to this court, in order to supply said omission without expense or delay, the parties to the cause hereby stipulate and agree that the court may use and consider said stipulation as hereinbefore set out, and give it the like force and effect as

if the same was comprised in the record so certified by said clerk, and that neither party shall suffer harm by the omission. Each party will accompany his brief with a printed copy of the agreement, and the original will be filed and preserved in the office of the clerk of the Supreme Court.

DAVID P. DYER,
Att'y for Plaintiff in error.

JOHN D. S. DRYDEN,
Att'y for Defendant in error.

August 16th, 1880.